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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

JACK PAYNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is reported at 590 F.2d 206. An earlier opinion of the court of appeals (App. E, *infra*, 12a-16a) is reported at 572 F.2d 144. The order of the district court (App. D, *infra*, 5a-11a) is unreported. The original opinion of the district court (App. F, *infra*, 17a-65a) is reported at 434 F. Supp. 113.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 3a) was entered on January 12, 1979. A petition for rehearing was denied on March 20, 1979 (App. C, *infra*, 4a). On April 9, 1979, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including May 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court possesses and should have exercised supervisory power to suppress evidence allegedly obtained as the result of an illegal search that did not violate respondent's rights under the Fourth Amendment.

STATEMENT

In September 1976, respondent was indicted in the United States District Court for the Northern District of Ohio on a charge of knowingly and willfully making a false statement in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001. In particular, respondent was accused of falsely stating on his 1972 federal income tax return that he did not have a foreign bank account, when in fact he did have such an account at the Castle Bank and Trust Company in Nassau, Bahamas (App. F, *infra*, 17a-18a & n.1; A. 4).[1]

[1] "A." refers to the appendix in the court of appeals.

1. The critical piece of evidence in the government's case against respondent was a loan guaranty agreement, dated April 28, 1972, in which respondent pledged the money in his Castle Bank account as security for a $100,000 loan extended by the Bank of Perrine in Perrine, Florida, to Conel Development Inc. (App. F, *infra*, 29a; A. 229). The loan guaranty agreement was produced by the Bank of Perrine in response to government subpoenas, issued in April and May 1974, requesting the production of all documents concerning the Bank of Perrine's dealings with Castle Bank (App. F, *infra*, 29a).

Before trial, respondent moved to suppress the loan agreement and related testimony by government witnesses on the ground that the evidence had been obtained as the result of an illegal search conducted in Miami, Florida, in January 1973. The item searched was a briefcase belonging to Herbert Michael Wolstencroft, an officer of the Castle Bank who was visiting the United States.[2] The person primarily responsible for the search was Norman Casper, a private investigator working with the encouragement and assistance of Special Agent Richard Jaffe of the Internal Revenue Service.

Casper had met Wolstencroft several months earlier at Castle Bank's office in Nassau. Casper had

[2] The second count in respondent's indictment (A. 5) charged Wolstencroft with aiding and abetting the false statement offense by submitting to the IRS an affidavit confirming that respondent did not have an account at Castle Bank. Wolstencroft, a Bahamian resident, did not return to the United States to answer the indictment.

traveled to the Bahamas on that occasion in an attempt to obtain information that might be helpful to the IRS in its longstanding investigation into American taxpayers' use of secret foreign bank accounts as illegal tax havens.[3] When Casper spoke with Wolstencroft in Nassau, he saw what appeared to be a computerized list of depositors' names. Casper informed Agent Jaffe of what he had seen, and Jaffe asked him to acquire a copy of the list (App. F, *infra*, 20a; A. 280-282).

[3] The IRS investigation, known as Operation Tradewinds, began in 1965. In March 1972, IRS investigators in San Francisco, California, discovered that Allan Palmer, a suspected narcotics trafficker, had deposited into his personal bank account three checks drawn to his order by Castle Bank on its account at the American National Bank in Chicago (App. F, *infra*, 19a; A. 215). In May 1972, the San Francisco investigators informed Agent Jaffe of their discovery and requested any information Jaffe might be able to obtain concerning the source of Palmer's funds at Castle Bank. Agent Jaffe knew that the Bank of Perrine was one of Castle Bank's correspondent banks in the United States, and he also knew that Casper was friendly with F. Eugene Poe, the President of the Bank of Perrine and one of Castle Bank's directors (A. 222-224, 244-245, 280-281). Agent Jaffe asked Casper to learn what he could about Palmer's account at Castle Bank, and Casper turned for assistance to his friend Poe. Poe introduced Casper to Samuel Pierson, the President of Castle Bank, and Pierson in turn referred Casper to Wolstencroft (A. 280). Wolstencroft informed Casper that Palmer had opened an account at Castle Bank with $15,000 deposited through the Bank of Perrine. Wolstencroft also disclosed that in June 1972 the balance in Palmer's account was $25,000 (App. F, *infra*, 19a). Casper reported this information to Agent Jaffe, and Jaffe forwarded it to the IRS agents in San Francisco investigating Palmer (A. 216-217, 340).

After his initial meeting with Wolstencroft, Casper remained in "almost * * * constant touch" with the Castle Bank officer (A. 284). On at least two occasions prior to January 1973, Wolstencroft traveled to the United States and Casper introduced him to women in Miami (A. 290). The second woman to whom Casper introduced Wolstencroft was Sybil Kennedy, a private investigator who had worked with Casper previously (A. 289-290). In January 1973, in conversations with Wolstencroft, Casper learned that the bank officer would be traveling through Miami on his way to Chicago and that he would be carrying a briefcase filled with important Castle Bank records (App. F, *infra*, 21a; A. 285-286). Casper devised a plan by which he could, with Kennedy's help, obtain access to the information in the briefcase (A. 292-293).

Casper's scheme worked successfully. Wolstencroft visited Kennedy at her apartment and then went to dinner with her at a restaurant. While they were away, Casper entered the apartment with Kennedy's key and took Wolstencroft's briefcase to a locksmith, who made a key to open it. Casper then delivered the briefcase to Agent Jaffe, who supervised the copying of the Castle Bank records contained therein. Casper replaced the briefcase and its contents in Kennedy's apartment before she and Wolstencroft returned from dinner (App. F, *infra*, 21a-24a; A. 297-300, 306-314, 348-359).[4] The IRS paid Casper

[4] In the week before the briefcase search, Casper told Agent Jaffe that he might be able to provide some information if Jaffe could arrange for photographic services. He also told

$8,000 in cash for his services, and Casper in turn paid Kennedy $1,000 (App. F, *infra*, 25a; A. 316-317, 323-324, 367-368).

Among the documents included in the briefcase were lists of Castle Bank depositors (A. 228). Respondent's name appeared on one of the lists (App. F, *infra*, 28a; A. 236-237, 245-246, 250-251). Wolstencroft's briefcase also contained a number of documents referring to the Bank of Perrine and reflecting that bank's business dealings with Castle Bank (App. F, *infra*, 29a; A. 255). After examining the contents of the briefcase, Agent Jaffe began to make inquiries regarding many persons whose names appeared in the photographed materials. In November 1973, when Agent Jaffe contacted the IRS district office in Cleveland, Ohio, and asked about respondent, he learned that respondent had already been under investigation for nearly nine months for possible criminal income tax violations during the years 1968 through 1971 (App. F, *infra*, 29a; A. 238). Agent Jaffe reported that he had "unsubstantiated information" indicating that respondent maintained an account at Castle Bank (A. 261-262). An IRS agent

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Agent Jaffe that he would be "going into an apartment" to get a briefcase that would contain the documents to be copied (App. F, *infra*, 21a; A. 288, 306-309, 325-326, 356, 373). Agent Jaffe obtained his supervisor's approval for the operation and arranged for another IRS agent to vouch for Casper to the locksmith whom Casper had hired to make the key for the briefcase. At the time, Agent Jaffe did not know what use Casper planned to make of the locksmith (App. F, *infra*, 21a-22a; A. 308-311, 350-351, 356, 373).

from Cleveland visited Agent Jaffe in Miami, and Jaffe showed him a copy of the Castle Bank depositor list including respondent's name (A. 262-264). After reviewing this material and the other information it had gathered concerning respondent's tax returns for 1968 through 1971, the IRS Cleveland office decided that its criminal investigation should be discontinued due to insufficient evidence (A. 104, 242, 256-259, 264). The final report on the investigation was dated April 9, 1974 (App. F, *infra*, 29a; A. 264).

Thereafter, the Department of Justice began a grand jury investigation in Miami into possible criminal tax violations involving the improper use of secret foreign bank accounts (A. 239). In late April and early May 1974, the grand jury issued subpoenas to the Bank of Perrine requesting the production of all records pertinent to the bank's dealings with Castle Bank (App. F, *infra*, 29a; A. 240). The critical loan guaranty agreement was produced in response to these subpoenas, and in July 1974, Agent Jaffe notified the IRS Cleveland district office of the discovery of evidence of respondent's Castle Bank account. As a result of this new information, the Cleveland office in October 1974 opened the investigation that led to respondent's indictment (App. F, *infra*, 29a-30a; A. 111, 229-232, 240-241, 265).

2. In view of respondent's waiver of his right to a jury trial, the district court, with the agreement of the parties, decided to consolidate its consideration of respondent's pretrial motion to suppress with the trial on the merits (App. F, *infra*, 18a & n.2). The gov-

ernment did not introduce or attempt to introduce any of the materials taken from Wolstencroft's briefcase and photographed in January 1973. At the close of the evidence, the district court concluded that respondent lacked standing under the Fourth Amendment to challenge the legality of the 1973 search (App. F, *infra*, 38a-39a, 46a n.65). Nonetheless, the court suppressed the loan guaranty agreement and "the testimony of all the Government's witnesses as it relates to information discovered as a result of the guarantee" (App. G, *infra*, 66a). The only government evidence not suppressed was respondent's 1972 tax return and the testimony relating to that document (*ibid.*).

The district court held first that the disputed evidence, although not obtained in or derived directly from the search, was tainted by the search's illegality (App. F, *infra*, 30a-32a, 63a-64a). The court ruled that the government "did not meet its burden to show that [the critical evidence] was the product of an investigation *independent* of the information taken" in the illegal search (*id.* at 30a). The court further held that the government agents' conduct in encouraging and performing the illegal search demonstrated a "knowing and purposeful *bad faith hostility* to [a] person's fundamental constitutional rights" (*id.* at 46a, 48a-50a, 56a). Accordingly, the court concluded, the Due Process Clause of the Fifth Amendment required suppression of the challenged evidence, notwithstanding respondent's inability to assert any violation of his rights under the Fourth Amendment (*id.* at 46a-48a n.65, 55a-56a).

In the alternative, the district court held that "the federal courts' supervisory power over federal prosecutions should be invoked to exclude evidence obtained by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right" (App. F, *infra*, 58a-61a; footnotes omitted). The court ruled that the government's action in connection with the search of Wolstencroft's briefcase satisfied these criteria and that therefore all evidence obtained as a result of the search "must be excluded under this Court's supervisory function" (*id.* at 63a). The court candidly acknowledged (*id.* at 57a n.72) that it relied on the Due Process Clause as well as its supervisory power "because the Government might well argue that supervisory power to exclude is limited to these instances specified under the federal criminal rules." [5]

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[5] Initially, the district court did not enter a verdict. The government asked the court to vacate its order suppressing the loan guaranty agreement, to reach a verdict based on all the evidence, and then, if the verdict were guilty, to consider anew its decision on respondent's motion to suppress and to set aside the conviction if the court continued to believe that the motion should be granted and there was not sufficient independent evidence to support the verdict (A. 60-64). The court refused because it believed its suppression order was appealable before verdict. The government then appealed and also filed a petition for a writ of mandamus, seeking to compel the district court to follow the course described in the government's posttrial motion and thereby preserve the government's right to appeal. The court of appeals dismissed the appeal for lack of jurisdiction and denied the petition for a writ of mandamus (App. E, *infra*, 12a-16a). When the case was returned to the district court, that court vacated its earlier order suppressing the evidence, entered a verdict of guilty, and then reinstated its suppression order and set aside the verdict (App. D, *infra*, 5a-11a).

3. The court of appeals affirmed in a brief per curiam opinion. The court's entire discussion of the validity of the district court's suppression order was as follows (App. A, *infra*, 2a):

> Upon consideration of the briefs and arguments of counsel and the entire record, we conclude that the district court did not err in suppressing the evidence in the exercise of its supervisory powers. We agree with the district court that suppression was justified. Since we base our decision upon the exercise of supervisory powers, it is not necessary to reach the constitutional questions raised on the appeal.

The court did not address the government's contention that the disputed evidence was not tainted by the search of Wolstencroft's briefcase.

REASONS FOR GRANTING THE PETITION

This case presents the important question whether a federal district court, in the exercise of its supervisory power, may suppress relevant and probative evidence of criminal activity, even though the defendant's rights were not violated by the acquisition of the evidence and would not be violated by its introduction at trial. Similar questions concerning the existence and scope of the district courts' supervisory power in evidentiary matters were presented, but not decided, in *United States* v. *Jacobs*, cert. dismissed as improvidently granted, 436 U.S. 31 (1978), and *United States* v. *Caceres*, No. 76-1309 (Apr. 2,

1979).[6] This is a recurring issue of substantial significance to the conduct of criminal proceedings in the federal courts, and this case provides an appropriate occasion for its resolution.

The court of appeals' brief opinion proceeds on the implicit and correct assumption that the illegal search of Wolstencroft's briefcase did not violate any of respondent's constitutional or statutory rights. As this Court recently stated in *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 5, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." Respondent had no expectation of privacy in Wolstencroft's briefcase; indeed, the record does not reflect that respondent even knew Wolstencroft or was aware that he was traveling to the United States with Castle Bank records in January 1973.

Moreover, the court of appeals found it unnecessary to consider the district court's holding that respondent would be deprived of his Fifth Amendment

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[6] In *Caceres*, the Court did not address the government's argument that federal courts lack supervisory power to suppress evidence obtained in violation of internal agency regulations that require procedures not compelled by the Constitution or by statute. Slip op. 13 & n.22. Rather, the Court held that, under the circumstances of that case, there was "simply no reason why a court should exercise whatever discretion it may have to exclude evidence obtained in violation of the regulations." *Id.* at 15.

right to due process of law if evidence obtained as the result of the search of Wolstencroft's briefcase were used against him at trial (see note 13, *infra*). Rather, the court concluded that, even if the briefcase search did not infringe any of respondent's constitutionally protected interests, and even if the introduction of evidence derived indirectly from that search would not violate respondent's rights, suppression of the evidence was nonetheless proper as an exercise of the district court's supervisory power. This was error for several reasons.

1. First, whatever the source and proper scope of the judicial supervisory power, this Court's decisions clearly establish that the power is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern trials in the federal courts. This limitation was adverted to in *McNabb* v. *United States*, 318 U.S. 332, 341 n.6 (1943), and expressly declared in *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959): "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." [7]

Rule 402 of the Federal Rules of Evidence prohibits the exercise of any supervisory power the district court might otherwise have had to suppress the evidence

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[7] See also *Gordon* v. *United States*, 344 U.S. 414, 418 (1953); *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Funk* v. *United States*, 290 U.S. 371, 374-375, 379, 382 (1933).

derived from the search of Wolstencroft's briefcase. The Rule provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 402 was designed to change existing law and to limit the circumstances in which courts may properly refuse to admit probative evidence. Prior to enactment of the Federal Rules of Evidence,[8] questions of admissibility of evidence in criminal trials in the federal courts were governed by Fed. R. Crim. P. 26, 18 U.S.C. (1970 ed.) App., page 4502. That Rule provided in pertinent part:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Under Rule 26, the federal courts had the primary responsibility for developing, interpreting, and applying appropriate evidentiary standards.

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[8] The Rules were initially promulgated by this Court pursuant to its rulemaking power under the Rules Enabling Acts (18 U.S.C. 3771, 3772, 3402; 28 U.S.C. 2072, 2075). They were enacted into law as an Act of Congress (88 Stat. 1926) and became effective on July 1, 1975.

By adopting the Federal Rules of Evidence, Congress eliminated the authority of the federal courts to issue common law evidentiary rulings at odds with the standards prescribed in the legislatively enacted Rules. The Rules were intended "to provide a uniform code of evidence for use in the Federal courts, and to make conforming amendments to * * * the Federal Rules of Criminal Procedure." H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 1 (1973). One of these conforming amendments was the deletion of the above-quoted sentence from Fed. R. Crim. P. 26.[9] Moreover, the legislative history of Rule 402 shows that Congress chose its language with care: *all* relevant evidence is to be admitted, unless suppression is authorized "by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court *pursuant to statutory authority*" (emphasis added). The latter phrase was added by Congress to emphasize that affirmative legislative permission is a prerequisite for the promulgation or amendment of uniform rules of evidence for the federal courts. H.R. Rep. No. 93-650, *supra*, at 7.

The court of appeals did not rely on any constitutional provision, statute, or statutorily authorized rule to sanction the exclusion of the unquestionably

[9] The Advisory Committee Note to the amendment of Rule 26 explains: "The second sentence is deleted because the Rules of Evidence govern admissibility of evidence, competency of witnesses, and privilege."

relevant evidence in this case.[10] Rather, the court invoked a general supervisory power of undefined scope to suppress evidence allegedly tainted by an earlier government violation of rights belonging to someone other than respondent. But no such power exists after the enactment of Rule 402. Having strictly limited this Court's ability to fashion rules excluding otherwise relevant evidence, Congress plainly could not have intended to allow the district courts and courts of appeals an unfettered supervisory power to achieve the same result.

2. Even assuming that, notwithstanding Rule 402, Congress has left the federal courts free to exercise supervisory power to suppress evidence, the court of appeals erred in invoking that power as a justification for the exclusionary remedy in this case. This Court has repeatedly observed that the exclusionary rule is a judicially created remedy that should not be extended beyond the areas in which "its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). The Court has stated that the prime purpose of the exclusionary rule is the deterrence of future unlawful police conduct (*id.* at 347), and it has held that this purpose is adequately served if evidence unlawfully obtained is subject to suppression at the instance of

[10] Fed. R. Crim. P. 41 provides that a person aggrieved by an unlawful search and seizure may move to suppress evidence obtained as the result of the illegality, but neither the district court nor the court of appeals suggested that respondent was aggrieved, within the meaning of Rule 41, by the search of Wolstencroft's briefcase.

persons who have themselves been victims of the illegal search and seizure. The Court remarked in *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969):

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

See also Stone v. *Powell*, 428 U.S. 465, 486-489 (1976); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960) ("any apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice").

This salutary restriction on the applicability of the exclusionary remedy should not be abandoned under the rubric of supervisory power. The Fourth Amendment is the constitutional provision that is directly concerned with protecting persons from unreasonable searches and seizures; district courts should not be permitted to employ their supervisory power to redress unlawful searches by providing an exclusionary remedy in circumstances in which this Court has decided that such relief is an inappropriate means of enforcing the very constitutional provision that governs the legality of searches. See *United States* v. *Baskes*, 442 F. Supp. 322, 333-334 (N.D. Ill. 1977), appeal pending, No. 77-2178 (7th Cir.) (refusing to suppress evidence allegedly obtained as a result of the search of Wolstencroft's briefcase because "[t]he application of the supervisory powers doctrine in this case would constitute, in essence, a circumvention of the Fourth Amendment standing requirement").

This Court has ordinarily exercised its supervisory authority in the context of review of events occurring in or directly affecting the course of a trial or administrative proceeding. See generally Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. J. 1050 (1965). See also the cases cited in *United States* v. *Jacobs*, *supra*, Brief for the United States 11 n.9.[11] In the few cases in which the Court has turned its supervisory attention to the conduct of government officials outside the trial context (see *McNabb* v. *United States*, 318 U.S. 332 (1943); *Mallory* v. *United States*, 354 U.S. 449 (1957); *Rea* v. *United States*, 350 U.S. 214 (1956)), it has focused without exception on behavior that directly affected the person urging the application of an exclusionary

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[11] We have sent a copy of the government's brief in *Jacobs* to counsel for respondent.

remedy. In *McNabb*, the Court held that a federal conviction could not be based on a confession obtained from a defendant held in custody for two days prior to arraignment. In *Mallory*, the facts and result were similar, although the period of pre-arraignment detention was shorter, and the Court seemed to rely not so much on its supervisory power as on Fed. R. Crim. P. 5(a) (promulgated in 1946, after *McNabb*). In *Rea*, the Court enjoined a federal officer from testifying in a defendant's state prosecution concerning evidence obtained in an illegal federal search of the defendant's premises. These decisions strongly suggest that, even if the federal courts possess supervisory power to exclude evidence when they believe that course is proper, a proposition quite doubtful in view of Rule 402, that power should be "sparingly exercised" (*Lopez* v. *United States*, 373 U.S. 427, 440 (1963)), and plainly should not be exercised on behalf of a person like respondent, who was not the victim of any governmental misconduct.

3. The court of appeals' approval of the district court's use of its supervisory power in this case is especially troublesome because the court provided no effective supervision for future cases. The district court's initial opinion suggests (App. F, *infra*, 58a-61a; footnotes omitted) that federal courts should exercise their supervisory power to exclude evidence whenever it is obtained "by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right." The court of appeals offered no hint whether it

accepted this broad view or whether it only endorsed the district court's decision to exclude the challenged evidence in this case. If the latter reading of the court's opinion is correct, then district courts in the Sixth Circuit have been given no guidance whatever regarding the circumstances in which suppression is appropriate.[12] Exclusion of the relevant evidence of

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[12] The court of appeals completely ignored the government's contention that the loan guaranty agreement and other relevant evidence were not tainted by the January 1973 search. See Brief for the Appellant 50-62. (The government argued that the grand jury inquiry into the possible improper use of foreign bank accounts by United States taxpayers was a natural outgrowth of the nine-year-old IRS investigation and would have been conducted regardless of the briefcase search. The government also maintained that issuance of subpoenas to the Bank of Perrine was an entirely predictable action by the grand jury, in view of the Bank of Perrine's correspondent relationship with Castle Bank and its role in helping a suspected narcotics dealer establish an account there (see note 3, *supra*), both of which were known to Agent Jaffe before January 1973). Because the court of appeals did not address this contention, it is impossible to determine whether the court agreed with the district court's conclusion that the government failed to establish that the loan guaranty was discovered independently of the briefcase search or whether the court of appeals simply believed that the question of taint was irrelevant to the propriety of the district court's exercise of its supervisory power. By omitting all discussion of the connection between the challenged evidence and the illegal search, the court of appeals contributed further to the impression that it has asserted an essentially limitless power to exclude evidence whenever it disapproves of law enforcement practices, regardless of the relationship between those practices and a particular criminal proceeding.

respondent's criminal activity would thus penalize society by "deflect[ing] the truthfinding process and * * * free[ing] the guilty" (*Stone* v. *Powell*, *supra*, 428 U.S. at 490) without accomplishing the sole articulated purpose for the exercise of a court's supervisory power. If, on the other hand, the former reading is correct, then the court of appeals has decided that evidence obtained from a deliberate Fourth Amendment violation can never be used by the government, even against someone whose rights were not violated by the illegal search. Such a far-reaching rule, which conflicts with this Court's decisions under the Fourth Amendment, deserves more detailed consideration than the court of appeals' opinion reflects.

In sum, the district court's use of its supervisory power to accomplish indirectly what the court frankly conceded it was powerless to do directly under the Fourth Amendment, and the court of appeals' approval of the district court's exercise of that power without any effort to explain its appropriate bounds, shows this application of supervisory power to be essentially a standardless, "chancellor's foot" judicial veto over practices of the Executive Branch that the trial judge finds personally distasteful. The courts below have used supervisory power as nothing more than a rubric, a judicial "wild-card" to impose sanctions on the government not otherwise justified

by precedent. This is a development that warrants this Court's review.[13]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1979

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[13] In addition to excluding the loan guaranty agreement and other disputed evidence under its supervisory power, the district court held that the evidence should be suppressed because its introduction would violate respondent's rights under the Due Process Clause (App. F, *infra*, 41a-56a). The court of appeals expressly declined to review this portion of the district court's ruling (*id.* at 2a), and we therefore have not raised that issue here.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-5278

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JACK PAYNER, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Ohio

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Decided and Filed January 12, 1979

Before PHILLIPS, Chief Judge, KEITH, Circuit Judge, and PECK, Senior Circuit Judge.

PER CURIAM. This is the second appeal by the Government from the decisions of the district court granting the motion of defendant to suppress evidence. In *United States* v. *Payner*, 572 F.2d 114 (6th Cir. 1978), this court dismissed the appeal for want of jurisdiction.

Jack Payner was indicted for making false statements on his income tax return. The case was tried before the district court sitting without a jury. A motion to suppress was made in advance of trial, but no ruling was made at that time. Instead the dis-

trict judge proceeded to try the defendant on the merits of the case along with the motion to suppress. After all the evidence had been heard, the district court granted the motion of defendant to suppress, but made no decision on the merits.[1]

After this court dismissed the appeal in *Payner I*, the district court ordered that its previous suppression order be vacated and entered a verdict of guilty. Then the district court reinstated its suppression order and set aside the verdict of guilty. The Government again appeals from the suppression order.

Reference is made to the comprehensive opinion of the district court, *United States* v. *Payner*, 434 F. Supp. 113 (N.D. Ohio 1977) for a recitation of the facts upon which the suppression order is grounded.

Upon consideration of the briefs and arguments of counsel and the entire record, we conclude that the district court did not err in suppressing the evidence in the exercise of its supervisory powers. We agree with the district court that suppression was justified. Since we base our decision upon the exercise of supervisory powers, it is not necessary to reach the constitutional questions raised on the appeal.

Affirmed.

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[1] In his concurring opinion in *Payner I*, Judge Engel pointed out that the difficulty with the procedure followed by the district court is that it "unduly suspends the adjudicatory process after jeopardy has attached and leads to unnecessary confusion and a very real danger that the final judgment may be rendered on stale and longforgotten evidence." 572 F.2d at 146.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-5278

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JACK PAYNER, DEFENDANT-APPELLEE

[Filed January 12, 1979]

Before: PHILLIPS, Chief Judge, KEITH, Circuit Judge, and PECK, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-5278

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JACK PAYNER, DEFENDANT-APPELLEE

[Filed March 20, 1979]

ORDER DENYING PETITION FOR REHEARING

Before KEITH, Circuit Judge, PHILLIPS and PECK, Senior Circuit Judges.

No judge of the court having moved for rehearing en banc, the petition for rehearing has been assigned to the hearing panel.

Upon consideration, the court concludes that the petition for rehearing is without merit.

Accordingly, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR76-305

UNITED STATES OF AMERICA, PLAINTIFF

v.

JACK PAYNER, DEFENDANT

Judge John M. Manos

[Filed May 30, 1978]

ORDER

On April 7, 1978 the United States of America filed a motion to vacate the court's suppression order of April 28, 1977. On April 28, 1978 and again on May 9, 1978 the defendant filed briefs in opposition to the government's motion.

Facts

On September 14, 1976 the defendant, Jack Payner, was indicted on one count of making a false statement on his 1972 United States income tax return, in violation of 18 U.S.C. § 1001. The trial of

the case to the court, consolidated with the hearing on the defendant's motion to suppress, was begun on March 14, 1977. At the completion of the trial the court took both the issue of the defendant's guilt or innocence and the motion to suppress under advisement. On April 28, 1977 the court ordered suppressed

> . . . all evidence introduced in the trial by the Government with the exception of Jack Payner's 1972 tax return, Exhibit 1, and all testimony relating to that document.

See Order of April 28, 1977. On May 9, 1977 the United States filed a motion to vacate the order of April 28, 1977. In its motion to vacate the government argued that the court should have first determined the guilt or innocence of the defendant and if necessary,[1] order the suppression of evidence and vacate the finding of guilty. The government argued that only by this procedure would its right to appeal under Title 18 U.S.C. § 3731 be preserved. On May 23, 1977 the defendant filed a brief in opposition to the government's motion.

On May 26, 1977 this court denied the motion of the government to vacate and on May 27 the government appealed the suppression order. On March 17, 1978 the Sixth Circuit Court of Appeals dismissed the government's appeal for want of jurisdiction. Then on April 7, 1978 the government filed the motion to vacate under consideration in this order.

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[1] Clearly if the finding was not guilty, the court would not need to deal with the question of suppression.

Conclusions of Law

The government argues that the court should vacate the motion to suppress, find the defendant guilty or innocent and then, in the case of a guilty verdict, reinstate the motion to suppress. The government contends that only by taking this action will the court enable the government to implement its statutorily protected right to appeal the court's April 28, 1977 order. See 18 U.S.C. § 3731.

The defendant opposes the motion of the government on three grounds. *First*, the defendant argues that if the Court of Appeals were to reverse, in part, this court's suppression order and remand for further proceedings, then the defendant's constitutional right against being twice placed in jeopardy would be violated. *See United States* v. *Jenkins*, 420 U.S. 358, 370 (1975). The court finds the defendants first argument to be without merit. 28 U.S.C. § 3731 has been interpreted by the Supreme Court of the United States to allow appeal of an order suppressing evidence after a guilty verdict has been entered. As the Supreme Court stated:

> That court rightly concluded that the Government was entitled to appeal both the order granting the motion to suppress and the order setting aside the verdict of guilty, since further proceedings if the Government were successful on the appeal would not be barred by the "Double Jeopardy Clause." The District Court had sensibly first made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these

> rulings would require no further proceedings in the District Court, but merely a reinstatement of the finding of guilt.

United States v. *Ceccolini*, 98 S.Ct. 1054, 1057 (1978). *See also id.* at 1057 footnote 1 (Citations omitted). Further this court will not base its decision on speculation concerning problems that a particular ruling by the Court of Appeals *may* present.

The defendants *second* argument is that the delay in the court rendering its verdict on the guilt or innocence of the defendant violates the defendant's right to a speedy trial.

The court finds the defendant's second argument to be without merit. On May 9, 1977 the government filed a motion to vacate the suppression order and enter a verdict. This motion was vehemently opposed by the defendant and at that time the court decided not to enter a verdict because of the exceptional circumstances of this case. In its order of April 28, 1977 the court outlined its findings that agents of the United States Government had committed criminal acts in their zeal to obtain information concerning violations of the Internal Revenue Code. The court desired at that time, and continues to desire, that the individuals prosecuted with the fruits obtained from the government's illegal acts not suffer thereby. At the same time the court recognized that Federal Rule of Criminal Procedure 12(e), along with 18 U.S.C. § 3731, mandates that this court may not obviate the government's statutory right to appeal the court's suppression order. Accordingly, this

court attempted to effectuate both its desire not to allow illegal governmental activity to injure a citizen of the United States and its statutory duty to protect the government's right to appeal. The result was the court's decision to suppress the objectionable evidence but not to render a verdict which would have branded the defendant as a felon. As the court stated in its May 26, 1977 order:

> The court did not enter a verdict before it suppressed the evidence because to do so would have branded the defendant as a felon based on unconstitutionally obtained evidence, if the verdict had been guilty at that time.

See Order of May 26, 1977, p. 1.

The court believed, as is made clear in its order of May 26, 1977, that the government had the right to appeal the suppression order of April 28, 1977 without a prior verdict of guilty. At the same time the court noted that if it were incorrect about the government's right to appeal, it would reconsider its decision to suppress the evidence prior to rendering a verdict. As the court stated:

> If the Court of Appeals finds the government is barred from appealing the case as it currently stands, the Court will reconsider whether to vacate the suppression of evidence and then enter a verdict, or whether to enter a verdict on the evidence presently admitted.

See Order of May 26, 1977, p. 1.

On March 17, 1978 the Court of Appeals found that the government has no right to appeal as the case presently stands. This court is bound by that order and believes it is now required to render a verdict before suppressing the evidence. The court finds that neither a constitutional nor a statutory right to speedy trial will be violated by its rendering a verdict. *See United States* v. *Mulligan*, 520 F.2d 1327 (6th Cir. 1975); *United States* v. *Jackson*, 508 F.2d 1001 (7th Cir. 1975); *Smith* v. *Coleman*, 528 F.2d 1362 (5th Cir. 1976); *United States* v. *Crow Dog*, 532 F.2d 1182 (8th Cir. 1976).

Finally the defendant argues that to render a verdict now would require the court to sift through its stale or incomplete memory of testimony and evidence over a year old. The court rejects this argument on two grounds. First, the court's memory of this case, because of the extraordinary circumstances surrounding it, is vivid. The court believes it could accurately recall the testimony of each witness and his or her credibility. Secondly, and of greater importance, this court, during the process of deciding the motion to suppress, also decided the merits of the government's case. This was necessary because if the court had concluded that, looking at all the evidence, the defendant was not guilty, then the court would have simply found the defendant not guilty, and would not have spent the considerable time and effort preparing its memorandum of opinion on the motion to suppress. The court, at the time it issued the motion to suppress, had already concluded, based on all

the evidence, that the defendant, Jack Payner, was guilty, beyond a reasonable doubt, of making a false statement in violation of 18 U.S.C. § 1001, but for the reasons previously indicated, withheld that ruling until today. Accordingly, the court need not reweigh the evidence to render a verdict in this case, but will only have to announce its previously withheld decision. The court does not believe that Jack Payner has in any way been prejudiced by the courts procedure.

The court orders that:

1) The court order of April 28, 1977 suppressing evidence is vacated.

2) Based on all the evidence, the defendant, Jack Payner, is hereby found guilty beyond a reasonable doubt, of violating 18 U.S.C. § 1001.

3) The court now reinstates its order of April 28, 1977 and suppresses the evidence as set out in that order and herewith sets aside the verdict of guilty.

It is so Ordered.

/s/ John M. Manos
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5200

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JACK PAYNER, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed March 17, 1978

Before PHILLIPS, Chief Judge, ENGEL and KEITH, Circuit Judges.

PHILLIPS, Chief Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. ENGEL, Circuit Judge (p. 4) filed a separate concurring opinion.

PHILLIPS, Chief Judge. The Government appeals from the decision of the district court suppressing evidence in a prosecution for knowingly and wilfully making a false statement on a federal income tax return. Reference is made to the comprehensive opinion of the district court for a recitation of perti-

nent facts. *United States* v. *Payner*, 434 F.Supp. 113 (N.D. Ohio 1977).

The case was tried before the district judge sitting without a jury. A motion to suppress was filed in advance of the trial, but no ruling was made upon the motions at that time. After a jury had been waived, "by agreement of the parties, the court proceeded to try the defendant on the merits of the indictment together with the motion to suppress." 434 F.Supp. at 118. After all the evidence had been heard, the district judge granted defendant's motion to suppress the Government's evidence. No decision on the merits of the case has yet been made.

In a federal criminal prosecution, the Government's right to appeal is limited to the authorization contained in 18 U.S.C. § 3731. We construe this statute to forbid by express language the appeal undertaken in the present case:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, *not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information*, if the United States attorney certifies to the district court that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceeding. (Emphasis added).

As stated above, this appeal was undertaken after the hearing of the evidence of the trial on its merits

and before a verdict on the indictment. The Government argues that the purpose of the statute is to permit a governmental appeal in all cases where constitutionally permissible and that the statute is to be construed liberally, relying upon *United States* v. *Wilson*, 420 U.S. 332 (1975), and *United States* v. *Beck*, 483 F.2d 203 (3d Cir. 1973), *cert. denied*, 414 U.S. 1132 (1974). No matter how liberally this statute may be construed, however, we hold that it cannot be interpreted to grant to the Government a right to appeal under the facts of the present case.

It is further contended by the Government that double jeopardy has not occurred. We express no opinion on the double jeopardy issue. We simply hold that under the facts of this case, the express language of the statute bars an appeal by the Government.

Although the district judge is to be commended for the care with which he has researched the issues and the comprehensive opinion he has prepared, the procedure followed in the present case should not be encouraged or condoned. There should have been a separate hearing on the motion to suppress and disposition of that motion should have been made before the beginning of the trial on the merits. If this procedure had been followed, the Government would have preserved its right, before the beginning of the trial on the merits, to appeal under 18 U.S.C. § 3731 from the decision of the district court granting the motion to suppress.

The Government filed a petition in this court on July 22, 1977, seeking a writ of mandamus directing the district court to vacate its order suppressing the Government's evidence and to render a verdict on all the evidence. The petition for writ of mandamus was denied by an order of this court dated September 30, 1977, in which we said:

> The Government has filed a petition for writ of mandamus seeking an order from this court directing United States District Judge John M. Manos to vacate an order entered on April 28, 1977 suppressing the government's evidence in a criminal prosecution, *United States* v. *Jack Payner*, and further directing the district judge to render a verdict on all of the evidence introduced at the trial. Prior to filing the petition for writ of mandamus, the Government filed a notice of appeal from an order of the district court suppressing certain evidence in the case of *United States* v. *Payner*. The appeal which the Government has commenced will present every issue properly before the court pursuant to the Government's limited right of appeal in criminal cases pursuant to 18 U.S.C. § 3731. The Government may not expand the limited right of appeal under [the statute] by resort to the extraordinary writ of mandamus. The effect of the order of the district court suppressing the evidence in *United States* v. *Payner* is an issue, in any event, left to the decision of the panel to whom that appeal is assigned.

The appeal is dismissed for want of jurisdiction.

ENGEL, Circuit Judge, concurring.

Since in my opinion it is clear that the defendant had been put in jeopardy before the trial court entered its order suppressing the evidence, I concur in the conclusion that we are without jurisdiction to hear the government's appeal. The language of 18 U.S.C. § 3731 is too clear to be ignored.

Aside from the plain command of the statute, the difficulty with the procedure followed by the district court is that it unduly suspends the adjudicatory process after jeopardy has attached and leads to unnecessary confusion and a very real danger that the final judgment may be rendered on stale and long-forgotten evidence.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR76-305

Judge John M. Manos

UNITED STATES OF AMERICA, PLAINTIFF

v.

JACK PAYNER, DEFENDANT

[Filed April 28, 1977]

MEMORANDUM OF OPINION
MOTION TO SUPPRESS

On September 14, 1976 the defendant Jack Payner was indicted for knowingly and willfully making a false statement in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. § 1001. Specifically, the Government charged Payner with falsely stating on his 1972 Federal Income Tax Return that he did not have a foreign bank account when in fact he had an account of over $100,000 in the Castle Bank of the Bahamas.[1]

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[1] The question which Payner allegedly answered falsely read as follows:

On January 6, 1977, the defendant filed a motion to suppress all evidence obtained by the Government from allegedly illegal searches conducted by government agents during January of 1973. In response the Government argued that the evidence it intended to introduce against Payner was neither the direct product, nor the fruit of the allegedly unconstitutional searches, but was evidence obtained from sources independent of the searches in issue. Also, the Government argued that even if the evidence against Payner was obtained from information arising out of the January, 1973 searches, the evidence should not be suppressed because Jack Payner has no standing to raise the issue of the constitutionality of the searches. On March 14, 1977, by agreement of the parties, the Court proceeded to try the defendant on the merits of the indictment together with the motion to suppress.[2] This opinion deals only with the issues raised by the motion to suppress.

"Did you, at any time during the taxable year, have any interest in or signature or other authority over a bank, securities or other financial account in a foreign country (except in a U.S. military banking facility operated by a U.S. financial institution)?" *See*, Exhibit 1.

[2] The defendant waived his right to trial by jury. *See*, Jury Waiver Form. The Court consolidated the trial on the merits with consideration of the motion to suppress because it was necessary to know whether the Government's evidence was obtained from a source or sources independent of the search. See F. R. Crim. P. 12(e).

I.

FINDINGS OF FACT

A. *The seizures of January, 1973*

In 1965 the Internal Revenue Service initiated Operation Trade Winds for the purpose of gathering information about the financial activities of American citizens in the Bahamas.[3] Special Agent Richard Jaffe of the Jacksonville, Florida Office of the Internal Revenue Service (IRS) supervised the investigation.[4] IRS agents gathered information pertinent to Operation Trade Winds by making numerous trips to the Bahamas and by the use of over 30 informants.[5]

In June, 1972 the IRS suspected that the Castle Bank and Trust Company of the Bahamas functioned as an illegal tax haven for American taxpayers.[6] The IRS' suspicion was based on information about an alleged California narcotics dealer, Allan Palmer, who deposited a check in his bank account originally drawn on the Castle Bank of the Bahamas. Further investigation revealed that the Castle Bank had an account with the Bank of Perrine in Florida, and that Palmer had $25,000 in a Castle Bank account which he opened through the assistance of the Bank

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[3] See, Transcript of the Motion to Suppress [TRM] 9-10.

[4] TRM 24.

[5] TRM 133-135.

[6] TRM 138.

of Perrine.[7] In August, 1972 representatives of the IRS districts in San Francisco, Chicago, Miami, and Pittsburgh met in Jacksonville, Florida to discuss the involvement of the Castle Bank with respect to narcotic trafficking investigations pending in each district.[8]

In late October, 1972, Special Agent Jaffe met with one of his informants, Norman Casper, and asked him to obtain the names and addresses of the individuals holding accounts with the Castle Bank.[9] In the first week of November of 1972 Casper decided to secure the requested information[10] and in late November of 1972, as part of the scheme to get the names of the Castle Bank depositors, Casper introduced Sybol Kennedy to Michael Wolstencroft.[11] Wolstencroft was then an acquaintance of Casper's[12] and Vice-President and Trust Officer of Castle Bank. Sybol Kennedy was a private detective employed by Casper.[13] At the time Casper introduced Wolstencroft to Sybol Kennedy, Casper knew that Wolstencroft frequently traveled to the United States carrying a briefcase containing documents concerning the

[7] TRM 5. See also footnote 55 *infra*.

[8] TRM 61.

[9] TRM 80-81.

[10] TRM 81.

[11] TRM 89.

[12] Transcript [Tr.] 286.

[13] TRM 88.

operation of the Castle Bank.[14] In early January, 1973 Casper learned that Wolstencroft planned a business trip to the United States on January 15, 1973, and would have records of the Castle Bank in his possession during the trip.[15]

In the week preceding January 15, 1973 Casper and Special Agent Jaffe discussed a covert plan to intercept copies of the documents that Wolstencroft planned to bring into the United States. On Tuesday, January 9, 1973 Casper told Jaffe that he could get the documents from Wolstencroft but that he needed Jaffe to supply photographic services,[16] and on Thursday, January 11, 1973 Casper outlined to Jaffe his plan to get the documents from Wolstencroft.[17] Casper specifically told Jaffe that he planned to enter an apartment from which he expected to remove Wolstencroft's briefcase.[18] Jaffe told Casper

[14] TRM 91.

[15] TRM 84. On January 11, 1973 when Casper informed Jaffe of his plan, he simply advised Jaffe that he expected to obtain information from an apartment. Casper did not say that he had permission to enter the apartment or to take the briefcase containing Castle Bank information from the apartment. TRM 105-108. Contrast Jaffe's rendition of the events on the Thursday prior to the taking of the briefcase, at TRM 155, 172. The Court disbelieves Jaffe's assertion that Casper told him on January 11, 1973 that he received a key from the owner of the apartment from which he expected to obtain the information. *See also*, fn. 40, *infra*.

[16] TRM 87, 105, 146-147.

[17] TRM 105.

[18] TRM 105-106, 155.

that he would have to clear such an operation with his superior, Troy Register, Jr., Chief of the IRS Intelligence Division in Jacksonville.[19] After obtaining authorization from Register, Jaffe told Casper to proceed with the operation. On Friday, January 12 Casper phoned Jaffe and asked if the IRS could refer him to a locksmith who could be "trusted," [20] *which Jaffe did.*[21]

On January 15, 1973 Wolstencroft arrived in the United States and went to Sybol Kennedy's apartment. What occurred at her apartment, if anything, was not brought out at trial.[22] However, at 7:30 p.m.

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[19] TRM 108, 155. *See also,* fn. 40, *infra.*

[20] The following testimony was given by Casper regarding the need for a locksmith who could be trusted:

"Q. Isn't it a fact, Mr. Casper, you knew you were committing an illegal act, and you wanted somebody who could be trusted to keep his mouth shut about it?

"A. There is that possibility, yes.

"Q. Isn't that the fact.

"A. Yes." TRM 112-113. *See also,* TRM 149-150.

[21] TRM 149-150.

[22] Although testimony from Sybol Kennedy would have been very helpful to the Court in resolving the factual issue of the propriety or impropriety of the Government's conduct, with respect to Wolstencroft, counsel for the Government never called her as a witness, and the record fails to indicate that she was unavailable. It appears to the Court that it is peculiarly within the power of the Government to produce her, since she worked for its agent and she is totally unknown to the defendant. Therefore, the Court infers from her unexplained failure to testify that her testimony would be unfavorable to the Government by further delineating the improprieties of what Casper himself characterized as the "briefcase caper." *See,* TRM 117.

Sybol Kennedy and Wolstencroft left Kennedy's apartment to go to a restaurant on Key Biscayne, whereupon Casper entered the apartment with a key given him by Kennedy, and removed Wolstencroft's briefcase without permission.[23] Casper took the briefcase to a locksmith who had been recommended by the IRS, and who had previously refused to enter the apartment with him. Casper met the locksmith in a parking lot five blocks from Kennedy's apartment and instructed him to make a key for the briefcase.[24] Casper then took the briefcase to an IRS agent's private residence, selected by Jaffe as the rendezvous point, and opened it in Jaffe's presence. Over 400 documents were taken out of the briefcase and photographed.[25]

Jaffe, Casper, and an IRS photography expert used two cameras to photograph the documents, a "normal" camera and a microfilm camera.[26] The microfilm camera was used because it was faster[27] than

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[23] TRM 95.

[24] TRM 96. *See also,* TRM 111.

[25] TRM 97, 154, 157. Jaffe selected the home of an IRS agent which was located eight blocks away from where Casper met the locksmith. TRM 96. Jaffe selected this location because he knew that Casper needed to hurry and it was located close to the apartment from which the documents were purloined. TRM 155-157. For the number of documents photographed, *see,* TRM 130.

[26] TRM 148-149, 154.

[27] Jaffe was asked, "What was the necessity for your being hurried?" He replied, "Mr. Casper had to get the documents and the briefcase back to the apartment prior to the return of the owner." TRM 154-155.

a normal camera, and Agent Jaffe knew that the briefcase had to be returned to Sybol Kennedy's apartment before she and Wolstencroft got back from dinner.[28] To get the briefcase back timely Casper had Kennedy and Wolstencroft watched during their dinner. When Kennedy and Wolstencroft completed their dinner,[29] Casper's lookout [30] phoned him at the residence which the IRS used to photograph the documents. After all documents were copied, Casper closed the briefcase, accidently broke off the key in the lock,[31] and returned the documents to Kennedy's apartment at approximately 9:00 p.m.

Within the next two weeks Jaffe again met with Casper and told him that additional information concerning Castle Bank's customers was needed.[32] Casper obtained the requested additional information by sending Sybol Kennedy to the Bahamas to visit Wolstencroft. While there she stole a rolodex file from his office as Casper directed her to do.[33] The stolen

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[28] TRM 154.

obtained it?" and he answered, "I don't recall thinking that at

[29] TRM 158.

[30] Jaffe in answer to a question stated, "I don't know who the person was, but he [Casper] had arranged for somebody to observe the lady who owned the apartment and her date, and let them know when they were finished eating dinner, to give him some idea when they would be returning." Tr. 158.

[31] TRM 98-99, 157-158, 174-177.

[32] TRM 118, 126-129, 160.

[33] TRM 117-118.

rolodex file was then turned over to Jaffe, who expressed no concern over the methods used to obtain it.[34]

Casper was paid $8,000 in cash by the IRS for obtaining the information relating to Castle Bank.[35] Sybol Kennedy was paid approximately $1,000 by Casper from funds he received from the IRS for her part in obtaining the briefcase and the rolodex.[36]

This Court finds that the United States, through its agents, Richard Jaffe, and others, knowingly and willfully participated in the unlawful seizure of Michael Wolstencroft's briefcase,[37] and encouraged its informant, Norman Casper, to arrange the theft of a rolodex from the offices of Castle Bank.[38] The Court does not accept the Government's argument that Casper was an independent contractor who acted

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[34] Jaffe was asked by defense counsel, "Did you care how he obtained it?" and he answered, "I don't recall thinking that at the time, no sir." Defense counsel then asked, ". . . all you wanted was the information, and you did not care how it was obtained?" To which Jaffe responded, "Well, I certainly didn't expect him to murder anybody for it." TRM 161. Casper testified that when he handed Jaffe the rolodex file stolen from Wolstencroft's desk Jaffe "was rather elated." TRM 119.

[35] TRM 116.

[36] TRM 115, 123.

[37] It is important to note that the seizure was conducted in order to obtain information about depositors in Castle Bank; it was not to gain information about Wolstencroft." Jaffe was asked, "So you had no interest in taking action against Mr. Wolstencroft." He answered, "Yes, sir." TRM 165.

[38] This conclusion is reached by weighing the demeanor and reliability of each witness who testified and then accepting all, part, or none of what the witness has asserted. *See, United States* v. *Gargotto,* 510 F.2d 409, 411, fn. 1 (6th Cir., 1974).

alone, without the knowledge and concurrence of Jaffe.[39] Jaffe knew that Casper had hired Kennedy to date Wolstencroft, knew that Wolstencroft's briefcase would be taken without permission, furnished the name of a locksmith who could be "trusted," knew that the locksmith was hired to break into the briefcase, and knew that he and another IRS agent had to copy the documents in a hurry in order to get the briefcase back to the apartment before Wolstencroft's return.

That the proposed activity was unusual and that Jaffe knew it was unusual was demonstrated by his clearing the scheme with his superior.[40] The Court

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[39] TRM 145.

[40] Jaffe testified, "Whatever I knew, he [Register] knew." TRM 172-173. See also, Casper's responses to questions put to him by defense counsel at TRM 106-110.

"Q. Did you testify, Mr. Casper, before the hearings of the Rosenthal Committee?
"A. Yes.
"Q. And were you under oath when you testified?
"A. Yes.
"Q. Do you recall making these statements:

'I think that the memorandum was January, 1973. The memo said in effect a banker coming through would be coming through the Miami area and there might be some provision that I might have a way of obtaining the information that Mr. Jaffe and I had previously discussed.

'Now, approximately two days prior to this it really began to jell as to what I might be able to do, and I did something which was inadvertent, and that was that I told Mr. Jaffe that I would be entering an apartment and taking the briefcase out at the time.'

Do you remember that?

concludes that the United States was an active participant in the admittedly criminal conduct in which Casper engaged in order to procure the Castle Bank's documents in January of 1973.

"A. Yes, I do.
"Q. Do you remember further on testifying then that:

'After Mr. Jaffe told me that he had been in touch with his immediate supervisor or superior, and I assumed that to be Troy Register, and I asked him about it, and he said yes, and it has been cleared.'

Do you remember making that statement?
"A. Yes.
"Q. What was cleared?
"A. To the best of my knowledge, that it was permissible to go into the apartment and get a briefcase.
". . . .
"Q. Had he asked you how you were going to get into the apartment, Mr. Casper?
"A. At that time, no.
"Q. And you didn't tell him how you were going to get into the apartment?
"A. To the best of my recollection, no.
". . . .
"Q. Mr. Casper, you have indicated that what you stated in the Rosenthal hearings was correct, that Mr. Jaffe told you, 'Yes' and, 'It has been cleared.' Is that correct?
"A. Yes.
"Q. Did he tell you what had been cleard?
"A. No.
"Q. Did you ask him what had been cleared?
"A. No.
"Q. Did you ask him to get something cleared?
"A. No.
"Q. Do you remember testifying in this manner, Mr. Casper? You were asked by Mr. Moffitt:

'Q. What was inadvertent about your statement?
'A. I blurted it out. He didn't need to know about this. All I am going to do is supply information. I kind of

B. *The Payner Investigation*

In late 1971 and continuing through the early part of 1972 the Internal Revenue Service investigated the financial dealings of an alleged narcotics trafficker, Allen Palmer.[41] Through their investigation of Palmer they discovered a connection between the Bank of Perrine, located in Perrine, Florida, and the Castle Bank and Trust Co.[42]

On January 15, 1973 documents indicating that Jack Payner held a bank account with Castle Bank and Trust Co. were taken from Michael Wolstencroft's briefcase and duplicated by the Government.[43]

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kicked the bucket anyway, but that was his reaction to this, because immediately he drew up the warning flag, the red flag, and wanted to get clearance on this obviously before anything was done.'

". . . .

"Q. You said he drew up the warning flag, the red flag. You stated that, did you not?

"A. Yes, I did.

"Q. What did you mean by that when you made that statement?

"A. Mr. Jaffe at that time said to me, 'I have to get clearance.'

". . . .

"Q. Did he tell you what he had to get clearance about?

"A. No.

"Q. Nor did you inquire?

"A. No.

"Q. And before he got the clearance, you didn't do anything; is that correct?

"A. That is correct." See also footnote 20 supra.

[41] TRM 3-4.

[42] TRM 5. See footnote 55 *infra*.

[43] TRM 26-27, 31.

These same documents also indicated that the Perrine Bank was linked to the Castle Bank.[44] Within the next two weeks a rolodex was taken from the offices of the Castle Bank. The rolodex contained the name and address of Jack Payner.[45] On February 22, 1973 the Internal Revenue Service sent a letter to Jack Payner advising him that his 1968, 1969, 1970 and 1971 tax returns were being investigated.[46] On April 9, 1974 the investigation of Payner's 1968-1971 income tax returns was completed and his tax returns for those years were accepted as filed.[47] During April and May of 1974 subpoenas were issued to the Bank of Perrine requiring the production of all documents concerning Perrine's dealings with Castle Bank.[48] One of these subpoenas [49] uncovered a guarantee agreement, Exhibit 4, which pledged money in a Castle Bank account in the name of Jack Payner as security for a $100,000 loan by Castle Bank to Conel Development Inc. This guarantee was forwarded to the Cleveland Office of the IRS [50] and gen-

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[44] TRM 33.

[45] TRM 44.

[46] Tr. 221-222, 225.

[47] Tr. 232-233, and Exhibit D.

[48] TRM 19-20.

[49] The Government introduced Exhibit 300 as being the subpoena that produced Exhibit 4. However, the Government's witnesses were unable to confirm this. *See*, TRM 20.

[50] TRM 36.

erated an IRS investigation of Jack Payner's 1972 tax return.[51] That investigation, commenced on October 10, 1974, led to the return of this indictment against the defendant.

The initial issue presented is whether the Government met its burden of proof to show that Exhibit 4 was not the fruit of the January 15, 1973 seizure. The Court finds that the Government did not meet its burden to show that Exhibit 4 was the product of an investigation *independent* of the information taken from Wolstencroft's briefcase.

Special Agent Richard Jaffe was asked the following question, "Mr. Jaffe, do you know if the subpoena to the Bank of Perrine in 1974 was issued because of what was found in the briefcase." He answered, "I don't believe so." [52] This Court, viewing Richard Jaffe's testimony as a whole, including his demeanor while presenting his testimony, finds that Jaffe's testimony on this point was *unconvincing*. Jaffe admitted telling a committe of the United States Congress, under oath, "It [the briefcase] provided the leads as to where to serve the Grand Jury subpoenas." [53] Jaffe also admitted having said, "The information obtained from the informant was extremely valuable and was unavailable from any other source." [54] Further, the chronology of the events that

[51] TRM 18-19, 56.

[52] TRM 22. *See also,* TRM 34.

[53] TRM 33-34.

[54] TRM 33-34.

led to the subpoena casts doubt upon Jaffe's assertion of the independent source of the subpoena. If the Allan Palmer investigation was the reason for the Perrine Bank subpoena, which produced Exhibit 4, why wasn't that subpoena issued in 1972? This Court finds that it was not coincidence that the Perrine Bank was served with subpoenas shortly after the information in the briefcase had been examined and discussed throughout the IRS districts in the United States.[55]

[55] TRM 164-170. See also footnote 69 *infra.* This court specifically finds that the investigation of Allen Palmer produced information concerning a connection between the Castle Bank and the Bank of Perrine. The Palmer investigation, along with Casper's comment to Jaffe in June of 1972 that he (Casper) had once seen what might be a list of the Castle Bank clients, sharply intensified the I.R.S. interest in the Castle Bank. TRM 137-145. However, the Court finds that this information was insufficient to issue a subpoena to the Perrine Bank in 1972, and, for that obvious reason, the I.R.S. issued no such subpoena at that time. See F. R. Crim. P. 17(c); *United States* v. *Mitchell, et al.,* 377 F.Supp. 1326, 1329-1330 (D.D.C. 1974), *aff'd* in *United States* v. *Nixon, et al.,* 418 U.S. 683, 698-703 (1974) ["Good cause" required for issuance of a subpoena]. The interest generated by this information caused the August, 1972 meeting of representatives from four regional IRS districts, at which further intelligence gathering plans were made. TRM 144, 62-63, 80-81. However, the IRS still had insufficient data with which to obtain a subpoena from the Perrine Bank at the time of the August, 1972 meeting and therefore in late October, 1972, Jaffe asked Casper to obtain the names and addresses of individuals holding accounts with the Castle Bank. TRM 81. After October, 1972, Casper and Jaffe concocted the briefcase scheme which ultimately furnished the information used to issue the April or May, 1974 subpoena on the Perrine Bank.

The Court finds that the briefcase seized on January 15, 1973 provided the leads which resulted in the issuance of subpoenas to the Bank of Perrine in April and May, 1974. Further the Court finds that Exhibit 4 is a product of the seizure of January 15, 1973, and that the subsequent investigation and indictment of Jack Payner stemmed from the January 15, 1973 seizure.

II.

CONCLUSIONS OF LAW

The sole question of law presented is whether relevant evidence, accumulated as a result of the information found in Wolstencroft's briefcase, must be excluded from consideration of the Government's case against Jack Payner.[56] The defense argues that the seizure of the briefcase was illegal and unconstitutional, and that any evidence which is the product of that seizure must be excluded. The United States argues that Payner has no standing under the Fourth

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[56] This Court shall not deal with the seizure of the rolodex. There is no evidence that the information contained on the rolodex has been used by the Government in any way in the presentation of its case against Jack Payner. As was made clear in the Court's Findings of Fact, it was the briefcase material that led to the subpoenas on the Bank of Perrine and thereby the discovery of Exhibit 4, the guarantee. It is the exclusion of the guarantee as the fruit of the unlawful seizure which is the gravamen of the defendant's motion to suppress. The rolodex was not shown to play any part in uncovering the guarantee, since there was no evidence that the rolodex contained information showing a connection between the Castle Bank and the Bank of Perrine. *See* TRM 31.

Amendment to assert the alleged unconstitutionality of the seizure of the briefcase; that the seizure is not so heinous as to require exclusion of the evidence under the Due Process clause of the Fifth Amendment; and that the Court should not use its supervisory power over federal prosecutions as a basis for excluding the evidence.

The Exclusionary Rule

American jurisprudence recognizes numerous examples in which relevant, and otherwise admissible evidence is excluded from consideration in criminal prosecutions because of the procedure the Government used to obtain it.

The reasoning in support of the "exclusionary rule" is twofold. The *first* is the necessity to deter law enforcement officers from using illegal and unconstitutional procedures to obtain evidence of a crime. *See, e.g., Elkins* v. *United States*, 364 U.S. 206, 217 (1960); *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974); *United States* v. *Peltier*, 422 U.S. 531, 537-538, 95 S.Ct. 2313, 2317 (1975); *United States* v. *Janis*, 428 U.S. 433, 457, 96 S.Ct. 3021, 3034 (1976).

Thus, the Supreme Court wrote:

> "The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Elkins, supra*, 364 U.S., at 217.

The *second* reason for invoking the "exclusionary rule" is to maintain the integrity of the judicial process. *See, e.g., Elkins* v. *United States, supra,* 364 U.S., at 222; *Mapp* v. *Ohio,* 367 U.S. 643, 659 (1961); *Brown* v. *Illinois,* 422 U.S. 590, 599, 95 S. Ct. 2254, 2259 (1975). As the Supreme Court stated in *Mapp*:

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence." *Mapp, supra,* 367 U.S., at 659.

Although the exclusion of wrongfuly gathered evidence preserves important social interests, judicial suppression of relevant and reliable evidence is never ordered lightly [57] because society has important and substantial interests which *require* the admission of all relevant and reliable evidence in a criminal prosecution. *See, e.g., Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); *United States* v. *Janis,* 428 U.S. 433, 447, 96 S.Ct. 3021, 3029 (1976); *Brewer* v. *Williams,* 430 U.S. 387, 421, 97 S.Ct. 1232, 1250 (1977) (Burger, C.J., dissenting). The most notable social interest which favors admission of evidence is the concept that the trier of fact performs a truth-

[57] The result of the use of the exclusionary doctrine is often as Justice Cardozo puts it that "[t]he criminal is to go free because the Constable has blundered." *People* v. *DeFore,* 242 N.Y., at 21.

seeking function for both society [58] and the accused. The truth seeker can perform its essential social function of issuing accurate adjudications of factual guilt or innocence only if the law insures the presentation of the fullest range of relevant evidence to the trier of the facts.[59] *See, Brewer* v. *Williams,* 430 U.S. 387, 422, 97 S.Ct. 1232, 1251 (1977) (Burger, C.J., dissenting).

The decision whether or not to use the heavy hand of the exclusionary rule is determined by weighing the social interest in ascertaining accurately a particular defendant's factual guilt against the inconsistent competing social interest of deterring government officials from getting evidence in a manner that violates the Constitution. In *United States* v. *Janis,*

[58] It must be remembered that society has a considerable interest in the effective prosecution of criminals. *See, Michigan* v. *Tucker,* 417 U.S. 433, 451 (1974). As the Supreme Court stated in *Nardone* v. *United States:*

"Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land. In a problem such as that before us now, two opposing concerns must be harmonized: on the one hand, the stern enforcement of the criminal law; on the other, protection of the realm of privacy left free by Constitution and laws but capable of infringement either through zeal or design." *Nardone* v. *United States,* 308 U.S. 338, 340 (1939).

[59] Chief Justice Burger states, "In evaluating the exclusionary rule, it is important to bear in mind exactly what the rule accomplishes. Its function is simple—the exclusion of truth from the fact finding process." *Stone* v. *Powell,* 428 U.S. 465, 496, 96 S.Ct. 3037, 3053 (1976) (C.J. Burger, concurring).

supra, 428 U.S. at 454, 96 S.Ct., at 3032, the Supreme Court stated that the exclusionary rule is to be invoked when the evidence shows "a sufficient likelihood of deterring the [unlawful] conduct of the state [federal] police so that it [the social benefit of exclusion] outweighs societial costs imposed by exclusion." *See also, Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974); *Brown* v. *Illinois*, 422 U.S. 590, 610-611, 95 S.Ct. 2254, 2264-2265 (1975) (Concurring Opinion of J. Powell); *United States* v. *Calandra*, 414 U.S. 338, 348 (1975); *United States* v. *Peltier*, 422 U.S. 531, 537-538 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-567, 96 S.Ct. 3074, 3081-3087 (1976); *United States* v. *Perez*, —— F.Supp. ——, ——, fn. 33 (N.D. Ohio, 1977). Recently the Sixth Circuit stated:

> "The Supreme Court, however, has not proscribed the use of illegally seized evidence against all persons or in all proceedings. Rather, it has determined that there must in effect be a balancing of the benefits to defendants other than the victim of the search or seizure by containing police activities within the letter of the law against the encroachment upon the public interest in having defendants acquitted or convicted on the basis of all the evidence which exposes the truth, in deciding whether the exclusionary rule has application, and, a fortiori, whether standing to invoke the rule exists." *United States* v. *Hunter*, 550 F.2d 1066, 1074 (6th Cir. 1977).

The Supreme Court points to three separate situations in which the balance of competing interests may justify the exclusion of reliable, probative evidence.[60]

First, the High Court firmly established the constitutional principle that evidence obtained by the Government in violation of the Fourth Amendment right to be free of unreasonable searches and seizures shall be excluded from consideration against the person whose privacy interest has been invaded. *See, e.g., Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961); *Aldermann* v. *United States*, 394 U.S. 165, 171-172 (1969). *Second*, the Supreme Court also established the constitutional principle that the Government violates the Due Process rights of an individual who is the target of a search procedure which is so *outrageous* that it shocks a court's conscience. Evidence obtained by such outrageous Due Process violations must be excluded. *See, Rochin* v. *California*, 342 U.S. 165, 169-174 (1952); *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964); *Lego* v. *Twoney*, 404 U.S. 477, 485-486 (1972). *Third*, federal courts sustain supervisory power to exclude evidence which the Government obtained in a manner so inconsistent with American standards of justice that to allow admission of the evidence calls into question the integrity of the entire federal judicial system. *See, McNabb* v. *United*

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[60] There are a number of other areas in which courts have excluded evidence. For example, *see, Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Brown* v. *Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975) [Fifth Amendment right to remain silent]; *Gilbert* v. *California*, 388 U.S. 263 (1967) [Sixth Amendment]

States, 318 U.S. 332, 340-344 (1943); *Elkins* v. *United States*, 364 U.S. 206, 216-223 (1960); *United States* v. *Valencia*, 541 F.2d 618, 621-622 (6th Cir., 1976).

This Court must analyze the facts of Payner's case and determine the admissibility, against him, of the materials derived from the briefcase by applying the balance of interest test appropriate to each of the three different legal theories under which evidence may be excluded.

The Fourth Amendment

In order for a court to suppress material under the Fourth Amendment, the evidence in question must be: (1) the product of an unconstitutional search or seizure, *see, e.g., Weeks* v. *United States*, 232 U.S. 383 (1914); (2) obtained in a search conducted by the Government, *see, e.g., Burdeau* v. *McDowell*, 256 U.S. 465 (1921); and (3) seized from a party who has standing to assert the unlawfulness of the search and seizure, i.e., the movant must be the person whose privacy interests were violated, *see, e.g., Alderman* v. *United States*, 394 U.S. 165 (1969). In this case the Government admits that the search and seizure of Wolstencroft's briefcase violated his Fourth Amendment rights, and this Court expressly finds that the search was conducted at the Government's behest and with its concurrence. However, Jack Payner possessed no privacy interest in the Castle Bank documents that were seized from Wolstencroft. *See, e.g., California Bankers Association* v. *Shultz*, 416

U.S. 21, 49 (1974); *United States* v. *Miller*, 425 U.S. 435, 440-441, 96 S.Ct. 1619, 1622-1623 (1976); *Couch* v. *United States*, 409 U.S. 322, 335-336 (1973). Therefore Payner has no standing under the Fourth Amendment to raise the illegality of the seizure of Wolstencroft's briefcase. As the Supreme Court stated:

> "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States*, 394 U.S. 165, 171-172 (1969).

See, e.g., Jones v. *United States*, 362 U.S. 257, 261 (1960); *Brown* v. *United States*, 411 U.S. 223, 229-230 (1973); *United States* v. *Hunter, et al.*, 550 F. 2d 1066, 1072 (6th Cir. 1977).[61]

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[61] It has been argued that the Supreme Court in *Jones* v. *United States, supra* and *Alderman* v. *United States, supra* did not intend to preclude an accused *who was the target* of an illegal search but who, as here, was not the person who was actually searched, from having standing to raise the Fourth Amendment exclusionary rule. *See, United States* v. *Lisk*, 522 F.2d 228, 231 (7th Cir., 1975) (Swygert, concurring); *United States* v. *Alewite*, 532 F.2d 1165, 1167 (7th Cir., 1976); *United States* v. *Roger S. Baskes*, —— F.Supp. ——, Case No. 76CR585 (N.D. Ill., March 23, 1977). This Court is convinced from its reading of *Jones, Alderman*, and *Mancusi* v. *DeForte*, 392 U.S. 364, 367-372 (1968), as well as the more recent Supreme Court decisions of *United States* v. *Miller*, 425 U.S. 435, 440-443, 96 S.Ct. 1619, 1622-1624 (1976), and *California Bankers Association* v. *Shultz*, 416 U.S. 21, 41 (1974), that only a party whose expectation of privacy has

The standing requirement of the Fourth Amendment demonstrates the Supreme Court's use of the *Janis, supra,* balancing test. The Court has decided that the police must be deterred from violating the central interest that the Fourth Amendment protects, an individuals expectation of privacy, when asserted personally. *United States* v. *Dionisio,* 410 U.S. 1, 8-9 (1973). However, when an expectation of privacy is asserted vicariously, the Court has found the deterrent interest served by exclusion less substantial and has struck a balance in favor of society's truth-seeking interest by allowing admittedly unconstitutionaly gathered material into evidence. As the Supreme Court stated in *Alderman*:

> "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman, supra,* 394 U.S., at 174-175. *See also, Brewer* v. *Williams,* 430 U.S. 387, 421 fn. 4, 97 S.Ct. 1232, 1251, fn. 4 (1977) (Burger, C.J., dissenting).

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been violated may raise the unconstitutionality of a search and seizure under the Fourth Amendment.

The Fifth Amendment

The Supreme Court has long recognized the principle that all criminal prosecutions must meet the bare minimum requirements of Due Process of law. What this entails is best explained by reference to the words of Justice Frankfurter in *Rochin* v. *California*:

> "Regard for the requirements of Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental', or are 'implicit in the concept of ordered liberty'.
>
> ". . . .
>
> "Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each

case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts, exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Rochin* v. *California*, 342 U.S. 165, 169 and 172 (1952) [citations omitted].

In *Rochin* the defendant was charged and convicted of possession of morphine by the State of California. The key evidence against the defendant were two capsules of morphine, which the police had extracted from the defendant by force and against his will by using a "stomach pump." In overturning the conviction as violating Due Process, the court stated:

". . . We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceedings by agents of government to obtain evidence is bound too offend even hardened sensibilities." *Rochin* v. *California*, *supra*, 342 U.S., at 172.

In a number of other cases the Supreme Court has likewise excluded relevant evidence because the pro-

cedures uesd to obtain it violated Due Process. In *Jackson* v. *Denno*, 378 U.S. 368, 386 (1964), the Supreme Court approved the exclusion of involuntary confessions stating:

"because of 'the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.'" *Id.* at 386 [citations omitted]. *See also*, *Lego* v. *Twoney*, 404 U.S. 477, 485 (1972); *Brown* v. *Mississippi*, 297 U.S. 278, 286 (1936).[62]

On the other hand, a number of Supreme Court and other lower court opinions recognized the possibility of excluding evidence under the Due Process Clause, but have rejected exclusion because of the particular facts presented in the case. These cases illustrate factual patterns which the Court found insufficiently egregious to warrant exclusion under Due Process.

In *Hoffa* v. *United States*, 385 U.S. 293 (1966) the Supreme Court rejected the argument of the defendant that the evidence procured through the use of a paid informant should be excluded under the Due Process Clause. In that case an informant was

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[62] The approval of the exclusion of coerced confessions in *Jackson* was not solely because of their unreliability but was also because the manner of obtaining the confessions violated principles of Due Process. *See*, *Jackson* v. *Denno*, *supra*, 378 U.S. at 385-386; *Lego* v. *Twoney*, *supra*, 404 U.S. at 485, fn. 13.

paid by the Government to visit the defendant and report what Hoffa said and did. In rejecting the exclusion of the informant's testimony the court stated:

> "This is not to say that a secret government informer is the slightest degree more free from all relevant constitutional restrictions than is any other government agent. It *is* to say that the use of secret information is not *per se* unconstitutional." *Hoffa* v. *United States*, 385 U.S. at 311 [citations omitted].

The Supreme Court stated in *United States* v. *Russell*, 411 U.S. 423 (1973):

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *United States* v. *Russell*, *supra*, 411 U.S., at 431-432.

In *Russell* a government agent supplied a chemical to the defendant which was used to manufacture an illicit drug. The Supreme Court found the Government had done nothing illegal and had not infringed Due Process.

Two recent circuit court decisions reviewed the arguments for excluding evidence based on Due Proc-

ess violations. *See*, *United States* v. *Spivey*, 508 F.2d 146 (10th Cir., 1975), cert. denied, 95 S.Ct. 1682 (1975); *United States* v. *DeSapio*, 435 F.2d 272 (2nd Cir., 1970). In both cases the court looked at whether the Government itself actively participated in illegal conduct and, finding that it had not, concluded that Due Process was not violated. As the court in *Spivey* stated,[63]

> "There is no evidence that the government in any way directed or controlled Redman's [the informant's] activities. On the contrary, there is evidence that on earlier occasions Redman had been cautioned not to break the law.
>
> "Our review of this testimony confirms our conclusion, that the government's conduct here does not offend the 'sense of justice' referred to in *Rochin* v. *California*, *supra*, and *Brown* v. *Mississippi*, *supra*." *United States* v. *Spivey*, *supra*, 508 F.2d, at 151.

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[63] There is one more case that bears reviewing. In *Irvine* v. *California*, 347 U.S. 128 (1954) the Supreme Court refused to extend the *Rochin* concept of a Due Process exclusionary rule to a fact situation in which evidence was introduced that the police had entered the defendant's home without permission on a number of occasions and planted microphones. The Supreme Court in *Irvine* was split, four Justices joining in an opinion rejecting the use of *Rochin*, one Justice, Justice Clark, concurring in the judgment only because he felt bound by the court's decision in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), and four Justices dissenting on the basis that the evidence must be excluded because it violated Due Process. *See*, *Irvine* v. *California*, *supra*, 347 U.S. at 142-149. Since *Wolf* has been overruled by *Napp* v. *Ohio*, 367 U.S. 643, 654, 644 (1961), the vitality of *Irvine* is questionable.

See also, *United States* v. *DeSapio, supra,* 435 F. 2d, at 282; *Bradford* v. *Johnson,* 354 F.Supp. 1331, 1334-1337 (E.D. Michigan, S. D., 1972).

Synthesizing and distilling the case law discussed above, this Court concludes that Due Process requires exclusion of reliable evidence only in those cases in which government officials obtain the challenged materials in a grossly improper fashion, i.e., by engaging in illegal conduct which exhibits their knowing and purposeful *bad faith hostility* to any person's fundamental constitutional rights.[64] Therefore, under the *Janis* balance of interests test, society's interest in deterring Due Process violations outweighs society's interest in allowing the fact finder to view all relevant evidence only when an official's conduct demonstrates a bad faith hostility to the strictures imposed on him by the Constitution.[65]

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[64] Neither a technical violation of the law, nor police conduct which is entered into in good faith, but which in fact proves to be illegal would be basis for the exclusion of evidence on Due Process grounds. *See, Brown* v. *Illinois,* 422 U.S. 590, 607-612, 95 S.Ct. 2254, 2265 (1975) (J. Powell, concurring); *Brewer* v. *Williams,* 430 U.S. 387, 420-423, 97 S.Ct. 1232, 1250-1251 (1977) (C.J. Burger, dissenting).

[65] There is no standing problem in this case in regard to the Fifth Amendment Due Process question. In the Fourth Amendment area, exclusion deters violations of the core Fourth Amendment interest, an individual's reasonable expectation of privacy. The Fourth Amendment expectation of privacy of a defendant such as Jack Payner was not violated by the IRS breaking and entering into Wolstencroft's briefcase and Kennedy's theft of Wolstencroft's rolodex file. In the normal case, where officers acting in *good faith,* technically violate an individual's reasonable expectation of privacy,

third persons, such as Payner, are not accorded standing to exclude the fruits of the illegally obtained evidence because such third persons are not asserting an intrusion into their own expectation of privacy and the police conduct is not outrageous. In such a situation the *Janis* balance of interests test favors admissibility because no party's constitutional interest is vindicated by exclusion, and the character of the police behavior, i.e., unconscious, unintentional violation of the Fourth Amendment, cannot be deterred by exclusion. However, under the Due Process concept, the *Janis* balancing test shifts markedly in favor of extending standing to third parties, such as Payner, to raise the exclusionary rule because an element of the Due Process violation is *outrageous* official conduct which violates the constitutional rights of an individual, situated like Wolstencroft, in a fashion which is knowing, purposeful, and with a bad faith hostility toward the right violated. Such intentional bad faith conduct is as susceptible of deterrence as any crime committed purposefully by an ordinary civilian. *Compare,* the balancing approaches discussed in *Stone* v. *Powell,* 428 U.S. 465, 489-496, 96 S.Ct. 3037, 3049-3052 (1976); *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 554-567, 96 S.Ct., 3074, 3081-3087 (1976); *United States* v. *Janis,* 428 U.S. 433, 453-460, 96 S.Ct. 3021, 3031-3035 (1976); *United States* v. *Calandra,* 414 U.S. 338, 348 (1974); *United States* v. *Peltier,* 422 U.S. 531, 537-533 (1975). Furthermore, in a case such as this, where the Court finds that the person who is the object of the outrageous governmental conduct, was never himself the ultimate target of the governmental investigation, then the Court must furnish those persons who are the ultimate targets with standing to raise the exclusionary rule in order to insure that some party is available to litigate the question of the Government's outrageously unconstitutional activity. Without such an expanded Due Process exclusionary rule standing theory, the Government could repeatedly commit outrageous constitutional violations with impunity against citizens, in order to obtain convictions of other citizens, so long as the government agents accept the speculative possibility of defending civil damage actions initiated by the few primary victims hardy and knowledgeable enough to file such an action. Thus, if the Court did not extend the Due Process exclusionary rule to persons situ-

The Court finds that the illegal conduct [66] of the government officials involved in this case compels the conclusion that they knowingly and purposefully ob-

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ated in Payner's position, purposeful, bad faith constitutional violations by the Government might well be capable of repetition, and evade review. *See, Jones* v. *United States,* 362 U.S. 257, 261 (1960); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 383, 396-398 (1971); *Olmstead* v. *United States,* 277 U.S. 438, 485 (1927) (Mr. Justice Brandeis, dissenting); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Company* v. *I.C.C.,* 219 U.S. 498, 515 (1911); *United States* v. *W. T. Grant Company,* 845 U.S. 629, 632-633 (1953); *Compare and contrast, McNea* v. *Garey, et al.,* 434 F.Supp. 95, 104, fn. 7, (N.D. Ohio 1976); *United States* v. *Perez,* —— F.Supp. ——, —— fn. 32 (N.D. Ohio, 1977).

[66] The facts surrounding the IRS appropriation of the bank records from Wolstencroft's briefcase appear to satisfy a prima facie case of criminal larceny under Florida law. Section 812.011 of the Florida Statutes defines "property" as "anything of value, including, but not limited to—real estate, tangible and intangible personal property, ..." Section 812.021(a) of the Florida Statutes states, "A person who, with intent unlawfully to . . . deprive the true owner of his property . . . . or to appropriate the same to the use of the taker or of any other person: . . . takes from the possession of the true owner, or of any person . . . or appropriates to his own use, or that of any other than the true owner, any property "is guilty of either a misdemeanor or a felony. Significantly, the Florida courts hold that, "In order to convict a person under § 811.021, Fla. Stat., F.S.A., it is not necessary that the elements of common law larceny be proven. . . . It is enough to prove that the defendant 'secrets, withholds, or appropriates to his own use, or that of any other person, other than the true owner, . . . the property in question." *Thomas* v. *State,* 216 So.2d 780, 781 (Fla. App., 1968); *see also,* F.S.A. § 812.021(5). Certainly the list of a foreign bank's customers, which list is secret under the law of a foreign state, consti-

tained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution.

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tutes intangible personal property which has value. In fact Casper was paid $8,000 for that list. TRM 116. The record also clearly shows that Casper took the Castle Bank's secret customer list, an item of intangible personal property from Wolstencroft and appropriated it to his "own use or that of any other than the true owner" by selling it to the Internal Revenue Service. *See,* fn. 20, *supra.*

Jaffe's active participation in Casper's crime, as evidenced by his arranging for a place in which to photograph the Wolstencroft documents, and his appropriation of the Wolstencroft materials for his own use as well as the use of the IRS, probably renders him guilty of a Section 812.021(a) violation as a principal in the first degree under F.S.A. § 777.011 which pertinently provides:

> "Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed, . . . is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense."

The type of conduct which the government agents exhibited in connection with the "briefcase caper" was so outrageously improper that it probably satisfies the elements of F.S.A. § 812.081 criminalizing the unauthorized appropriation of trade secrets such as secret "lists of customers," by copying such lists without permission of the owner. *See,* § 812.081(1)(c), (3). Section 812.081 carries a different penalty than a larceny violation under Section 812.021(a). *See,* Sections 812.081(2), 775.082(4)(a), 775.083(1)(d) and *contrast* those provisions with the punishment proscribed under Section 812.021(2), (3), 775.082(3)(d), 775.083(1)(c). *See also,* fn. 75, *infra.*

The criminal activity by the government's agents is this case is particularly distressing because the briefcase information which they seized by means which were violative of

The activities of the Government agents Jaffe and Casper [67] were outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal.[68] It is imperative to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit. As Mr. Justice Brandeis stated in *Olmstead* v. *United States*:

Florida's criminal law, could probably have been obtained both constitutionally and without violating Florida criminal law, if the officers simply obtained a search warrant. From the record as currently constituted in this proceeding it certainly appears that the information which the IRS possessed regarding Allan Palmer's alleged use of the Castle Bank to hide—illegal income from the IRS combined with the information from Casper, clearly a reliable informant, that Wolstencroft would enter the United States with Castle Bank depositors records, might well have furnished the Government with probable cause to suspect that the records in Wolstencroft's possession constituted evidence of criminal tax evasion by some American depositors of the Castle Bank. *See, United States* v. *Manufacturers National Bank of Detroit,* 536 F.2d 699, 702-703 (6th Cir., 1976). Thus it appears likely that government officers chose to do illegally that which they could have achieved through lawful, constitutionally recognized proccesses. *See* TRM 168.

[67] As the Supreme Court has stated: "The Government cannot make such use of an informer and then claim dissociation through ignorance." *Sherman* v. *United States,* 356 U.S. 369, 375 (1958).

[68] Casper admitted on the witness stand that he knew he was "committing an illegal act, and [he] wanted somebody who could be trusted to keep his mouth shut about it. . . ." TRM 112-113.

"Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." *Olmstead* v. *United States,* 277 U.S. 438, 485 (1927).

The need to deter gross illegal activity on the part of the Government, such as occurred in this case, is clear. However, the utility of the exclusionary rule in actually deterring illegal activity is often in question. *See, e.g., United States* v. *Janis,* 428 U.S. 433, 443-449, 96 S.Ct. 3021, 3027-3030 (1976); *Stone* v. *Powell,* 428 U.S. 465, 496, 96 S.Ct. 3037, 3052, 3053 (1976) (C.J. Burger, concurring); *Brewer* v. *Williams,* 430 U.S. 387, 420-423, 97 S.Ct. 1232, 1250-1251 (1977) (C.J. Burger, dissenting).

The Court finds, from the testimony adduced at trial, that exclusion of the illegally obtained evidence in this case will have a deterrent effect. It is evident

that the Government and its agents, including Richard Jaffe, were, and are, well aware that under the standing requirement of the Fourth Amendment, evidence obtained from a party pursuant to an unconstitutional search is admissible against third parties who's own privacy expectations are not subjected to the search, even though the cause for the unconstitutional search was to obtain evidence incriminating those third parties.[69]

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[69] At trial the following colloqui took place between Mr. Jaffe and an attorney for the defendant:

"Q. And didn't Mr. Hyatt [a Justice Department attorney] in a memorandum to you of April, 1974, indicate that no one had standing to object legally in court to the use of the briefcase matter except Mr. Wolstencroft?

"A. The memorandum was not directed to me, sir.

"Q. Who was it directed to?

"A. I believe it was directed to his superiors in the Department of Justice.

"Q. Well, you were familiar with the contents of the memorandum?

"A. Yes.

"Q. And isn't what I said substantially the contents of the memorandum?

"A. I believe that is substantially the position he took on the memorandum, yes, sir.

"Q. In fact, wasn't there some discussion, either by written memorandum or otherwise, indicating that they were not concerned with Mr. Wolstencroft because they were only after the other people that were named in the briefcase?

"A. I don't remember any such discussion.

"Q. Well, do you remember testifying before the Rosenthal Committee; do you remember?

"A. Yes, sir.

"Q. You did testify?

"A. Yes, sir.

This Court finds that, in its desire to apprehend tax evaders, a desire the Court fully shares,[70] the

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"Q. Do you remember in a discussion between you and Mr. Mezvinsky, in a question-and-answer session between you and Mr. Mezvinsky—and tell us whether or not this question was asked and whether this was your answer:

'Q. You have the Hyatt memo stating the activity would not be viewed as illegal or that it should not restrict your future activity, Mr. Jaffe?

'A. The context he put it was that none of the individuals on the list would have any standing to object legally in court to the use of our information.'

"A. Yes, sir.

"Q. And then do you recall this:

'The particular individual who had the briefcase might be able to assert that defense, but not the individuals themselves.'

"Do you remember that being said?

"A. Yes, sir.

"Q. And so you remember your saying this:

'That is right. We had no interest in taking action against him.'

"A. That is true.

"Q. So you had no interest in taking action against Mr. Wolstencroft?

"A. Yes, sir.

"Q. And from what Mr. Hyatt told you, Mr. Wolstencroft was the only person who had legal standing to object to the material being taken from his briefcase?

"A. I believe he mentioned the bank also had standing.

"Q. And the bank?

"A. Yes, sir." TRM 162-165.

[70] In the context of civil tax litigation this Court has recognized the need to permit the Internal Revenue Service wide latitude in order to thwart taxpayers from engaging in disengenuous practices that shelter income from taxation. *See, M.S.D. Incorporated, et al.* v. *United States of America,* 434 F.Supp. 85, 92 (N.D. Ohio 1977). However the balance of

Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search

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interests shifts markedly when the Internal Revenue Service seeks judicial authorization to purposefully intrude upon the fundamental interests secured by the Constitution. In *G.M. Leasing Corporation* v. *United States*, 429 U.S. 338, 354-358, 97 S.Ct. 619, 629-631 (1977), the Government asserted that its taxing interest in conducting warrantless probable cause entries into buildings to seize property subject to tax assessments outweighed the constitutional protections secured by the Fourth Amendment. The High Court expressly rejected the Government's assertion of a constitutionally recognized tax interest which outweighed the "core" Fourth Amendment interest in premises privacy. *See, Silverman* v. *United States*, 365 U.S. 505, 509-512, fn. 4 (1961). The *G.M. Leasing* court 429 U.S. at 354-355, 97 S.Ct., at 629-630, wrote:

> "Rather, the intrusion is claimed to be justified on the ground that petitioner's assets were seizable to satisfy tax assessments. This involves nothing more than the normal enforcement of the tax laws, and we find no justification for treating petitioner differently in these circumstances simply because it is a corporation.
>
> "The respondents [the Government] argue that there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy in the furtherance of enforcement of the tax laws. We recognize that the 'Power to lay and collect Taxes' is a specifically enunciated power of the Federal Government, Const., Art. I, § 8, cl. 1, and that the First Congress, which proposed the adoption of the Bill of Rights, also provided that certain taxes could be 'levied by distress and sale of goods of the person or persons refusing or neglecting to pay.' Act of March 3, 1791, c. 15, § 23, 1 Stat. 204. This, however, relates to warrantless seizures rather than to warrantless searches. It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite

and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS

> another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.
>
> "*Indeed, one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes* pursuant to general warrants and writs of assistance. As Madison argued, urging the adoption of a Bill of Rights to restrain the Federal Government:
>
> > 'The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments for exercising this power, there is like reason for restraining the Federal Government.' 1 Annals of Congress 438 (1834 ed.).
>
> "The respondents urge that the history of the common law in England and the laws in several States prior to the adoption of the Bill of Rights support the view that the Fourth Amendment was not intended to cover intrusions into privacy in the enforcement of the tax laws. We do not find in the cited materials anything approaching the clear evidence that would be required to create so great an exception to the Fourth Amendment's protections agents warrantless intrusions into privacy." (emphasis added).

The *G.M. Leasing* court also noted at 358, 97 S.Ct., at 631.

> ". . . [W]e are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute

agents in this case acted, and will act in the future, according to that counsel. Such governmental conduct compels the conclusion that Jaffe and Casper transacted the "briefcase caper" [71] with a purposeful, bad faith hostility toward the Fourth Amendment rights of Wolstencroft in order to obtain evidence against persons like Payner. That outrageous behavior on the part of the Government infringes Payner's Due Process rights, and can only be deterred by granting Payner's motion to suppress.

For this reason, the Court holds that the evidence against Payner, which is the fruit of the outrageously illegal seizure directed at Wolstencroft's briefcase, must be suppressed under the Due Process Clause of the Fifth Amendment to the United States Constitution.

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declaring *per se* exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure."

The proposition upon which the Government acted in this case, i.e., that it could intentionally commit a flagrant Fourth Amendment violation against Wolstencroft in order to obtain convictions of third persons like Payner, is the type of purposeful eviseration of the fundamental privacy interests secured by the Constitution which, the *G.M. Leasing* court concluded, is not sufficiently justified by the Government's need to enforce the tax laws.

[71] Casper himself refers to the Wolstencroft incident on January 15, 1973 as the "briefcase *caper*." TRM 117 (emphasis added).

Supervisory Power [72]

Above and beyond the constitutional requirement of Due Process, the federal judiciary has the duty of supervising the administration of criminal justice in federal courts. This duty requires the federal judiciary to take actions and make decisions which will further the ends of justice. In this regard the Supreme Court wrote:

> "It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. . . . Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and be-

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[72] The Court is well aware of the long established doctrine that constitutional questions will be avoided when an alternate means can be employed to the same effect. *Burton* v. *United States*, 196 U.S. 283, 295 (1904) ["It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."] *See, e.g., Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936). In this case the court holds that exclusion is required under Due Process and supervisory powers. The court deals with Due Process because the Government might well argue that supervisory power to exclude is limited to these instances specified under the federal criminal rules. Therefore, the court sets forth the Due Process basis for exclusion.

low which we reach what is really trial by force." *McNabb* v. *United States*, 318 U.S. 332, 339-340 (1943).

See also, Upshaw v. *United States*, 335 U.S. 410, 412-414 (1948); *Mallory* v. *United States*, 354 U.S. 449, 452-453 (1957); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960); *Nardone* v. *United States*, 302 U.S. 379 (1937); *Benanti* v. *United States*, 355 U.S. 96, 99-103 (1957); *Mesarosh* v. *United States*, 352 U.S. 1, 9-14 (1956); *Lopez* v. *United States*, 373 U.S. 427, 440 (1963); *Ker* v. *California*, 374 U.S. 23, 31-32 (1963); *Communist Party* v. *Subversive Activities Con. Bd.*, 351 U.S. 115, 124 (1956); *United States* v. *Valencia*, 541 F.2d 618, 621-622 (6th Cir., 1976); *Williamson* v. *United States*, 311 F.2d 441, 444 (5th Cir., 1962).[73]

The Court concludes from a review of the cases cited above, that the federal courts' supervisory power over federal prosecutions should be invoked to

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[73] In *Communist Party* v. *Subversive Activities Con. Bd.*, the Supreme Court stated:

"The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our prudent boasts. This court is charged with supervisory functions in relation to proceedings in federal courts. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party, supra*, 351 U.S., at 124. *See also, Mesarosh, supra*, 352 U.S., at 14.

exclude[74] evidence obtained by Governmental conduct which is either purposefully illegal[75] or motivated by an intentional bad faith hostility to a constitutional

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[74] As discussed in regard to the Due Process exculsionary rule, exclusion on the basis of supervisory power is only done as a last resort.

"The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court." *Lopez* v. *United States*, 373 U.S. 427, 440.

[75] *See, e.g., Nardone* v. *United States, supra*, 302 U.S. 379 (1939); *Benanti* v. *United States, supra*, 355 U.S. 99-103; *Williamson* v. *United States, supra*, 311 F.2d at 444 [". . . It becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes."]; *Rea* v. *United States*, 350 U.S. 214, 216-218 (1956); *Wise* v. *Henkel*, 220 U.S. 556, 558 (1911).

Exclusion under the Fifth Amendment Due Process Clause and federal courts' supervisory power is particularly important where *federal* officers are counseled to gather evidence in a fashion which violates the criminal law of a state and they purposefully violate such criminal laws in reliance on the erroneous counsel that their conduct is authorized by federal power. If such officers can demonstrate a subjective belief that their "conduct was necessary and proper under the circumstances," then they are immune from state prosecution, regardless of how flagrantly their actions violate a state's criminal law. *See, Clifton* v. *Cox*, 549 F.2d 722, 728 (9th Cir., 1977), a case in which, under the Supremacy Clause of the United States Constitution, a federal officer who shot and killed an unarmed fleeing suspect in the back during a raid on an illegal drug factory was granted a post indictment, pre-

trial, writ of habeas corpus blocking his prosecution in state court for second degree murder and involuntary manslaughter. *Compare, ExParte Neagle,* 135 U.S. 1, 75 (1890). In the case of *In Re Lewis,* 83 F. 159 (D. Wash., 1897) the court, applying the *Neagle* doctrine, granted a writ of habeas corpus blocking a state robbery prosecution of special employees of the United States Treasury Department and a United States Deputy Marshal who *wrongfully* seized private papers while executing a search warrant. The *Lewis* court observed at 160,

> "In deciding this case, I do not mean to say that the warrant which Mr. Kiefer issued was a lawful warrant, nor that the proceedings under it were proper proceedings. I do not mean to say that the petitioners were lawfully discharging their official duties in what they did. In my opinion, the warrant itself was improvidently and erroneously issued, and the proceedings were all ill-advised, and conducted with bad judgment. But where an officer, from excess of zeal or misinformation, or lack of good judgment in the performance of what he conceives to be his duties as an officer, in fact transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose appointment he is acting, and may also lay himself liable to answer to a private individual who is injured or oppressed by his action; yet where there is no criminal intent on his part he does not become liable to answer to the criminal process of a different government. With our complex system of government, state and national, we would be in an intolerable condition if the state could put in force its criminal laws to discipline United States officers for the manner in which they discharge their duties."

Evidently, the Supremacy Clause furnishes *federal* officers a broad, although perhaps not absolute, *see, United States ex rel. Drury* v. *Lewis,* 209 U.S. 1, 8 (1906), protection against state criminal prosecution when they violate state criminal laws while performing their federal duties. The existence of such official immunity for federal officers means that the deterrent effect of state criminal punishment for criminal conduct in their collection of evidence approaches zero. Absent the deterrent effect of state criminal prosecution, the only

right.[76] Put in terms of the *Janis* balancing test, only

practical deterrent to federal officers adopting means of federal law enforcement which are criminal under state law, is often the deterrence generated by federal court suppression of the fruits of federal officials' criminal investigative techniques. The Fifth Amendment Due Process and Supervisory Power concepts, in conjunction with the speculative possibility of civil damage judgments, are certainly appropriate instruments for administering an adequate dose of deterrence, while at the same time preserving an adequate level of criminal immunity for federal officials.

Of course 18 U.S.C. § 2236(b) poses none of the deterrence effected by state criminal law against purposefully improper conduct by federal officials when they act on "reasonable grounds" to suspect the person searched committed a felony. Likewise 18 U.S.C. §241 furnishes no deterrence to purposefully unconstitutional conduct by federal officers when the person who suffers an intrusion into his reasonable expectation of privacy is not a "citizen" (perhaps Wolstencroft is not a citizen) or the federal officers do not "go in disguise on the highway or on the premises of the person who's rights are violated."

Therefore, the deterrence rationale for exclusion under either the Fifth Amendment Due Process Clause or Federal Supervisory Power is uniquely compelling when a federal court is presented with evidence which federal officers clearly obtained through their active, affirmative participation in conduct which is criminal under state law, regardless of the Fourth Amendment standing considerations. As the Court discussed above, this is precisely such a case. *See,* fns. 65 and 66, *supra.*

[76] *Elkins* v. *United States, supra,* 369 U.S. at 216-217; *United States* v. *Valencia, supra,* 541 F.2d at 621-622. The need to deter government agents' purposeful hostility to individuals' constitutional rights is analogous to the policy rationale for excluding evidence seized in "pretext" searches. *See, South Dakota* v. *Opperman,* 428 U.S. 364, 382, 96 S.Ct. 3092, 3103 (1976) (Mr. Justice Powell, concurring); *Amador-Gonzales* v. *United States,* 391 F.2d 308, 313-315 (5th Cir.,

when the Government's procedure in obtaining evidence is purposefully illegal or the procedure is a knowing and purposeful act, performed with a bad faith hostility to an individual's constitutional right,[77] does society's interest in deterring such conduct by exclusion outweigh society's interest in furnishing the trier of fact with all relevant evidence.

The Court finds the Government's action in this case was both purposefully illegal[78] and an intentional, bad faith act of hostility directed at Wolstencroft's reasonable expectation of privacy.[79] The Court therefore finds that the evidence obtained by the Government as a result of the seizure of Wolstencroft's briefcase must be excluded under this Court's supervisory function.

1968); *Taglavore* v. *United States,* 291 F.2d 262, 265-267 (9th Cir., 1961); *McKnight* v. *United States,* 183 F.2d 977, 978 (D.C. Cir., 1950); *Blazak* v. *Eyman,* 339 F.Supp. 40, 42-43 (D. Ariz., 1971); *United States* v. *Carriger,* 451 F.2d 545, 553 (6th Cir., 1976); *United States* v. *Robinson,* 414 U.S. 218, 246-248 (1973) (Mr. Justice Marshall, dissenting); *United States* v. *Lefkowitz,* 285 U.S. 452, 467 (1932); *Abel* v. *United States,* 362 U.S. 217, 226, 230 (1960); *United States* v. *Perez,* —— F.Supp. ——, ——, fn. 40, Case No. CR76-346, Slip op., p. 21, fn. 40 (N.D. Ohio, April 21, 1977); *City of Cleveland* v. *Todor,* Case No. 34622, Slip Op., pp. 3-5 (Cuyahoga County Ohio Court of Appeals, March 4, 1976).

[77] The standing problems associated with the Fourth Amendment exclusionary rule, *see,* fn. 65, *supra,* are not present in regard to exclusion under supervisory power. *See, United States* v. *Valencia, supra,* 541 F.2d at 621-622. Exclusion under supervisory power maintains the integrity of the federal system and deters illegal and unconstitutional police activity. These interests are the directing issue in this case. This is not a case where exclusion is invoked solely to vindicate a technically invalid intrusion into Wolstencroft's expectation of privacy. The decision of whether to exclude or not is made by reference to the *Janis* balance of interests test, which test takes into account the standing question.

[78] *See,* fn. 66, *supra.*

Evidence Excluded

The remaining aspect of the case requires this Court to determine what evidence introduced by the Government against Jack Payner must be excluded. The question was phrased by the Supreme Court as follows:

> "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Alderman* v. *United States,* 394 U.S. 165, 180-181 (1969), citing *Wong Sun* v. *United States,* 371 U.S. 478, 488 (1963).

The Government has the burden to show that its evidence is untainted by the illegal search. *See, Alderman* v. *United States,* 394 U.S. 165, 183. It may do this in two ways: by proving that the evidence was obtained independent of the search, *see, e.g., Silverthorne Lumber* v. *United States,* 251 U.S. 385, 392 (1920); *Nardone* v. *United States,* 308 U.S. 338, 341 (1939); *Alderman* v. *United States, supra,* 394 U.S., at 183 (1969); or by demonstrating that the

[79] The Court made a finding that the government agents knew they were committing an unconstitutional search.

information which led to the discovery of the evidence is so far removed from the illegally seized evidence that the connection became "so attenuated as to dissipate the taint." *Nardone* v. *United States*, *supra*, 308 U.S., at 341; *see also*, *Wong Sun* v. *United States*, 371 U.S. 471, 487 (1963); *Brown* v. *Illinois*, 422 U.S. 590, 598, 95 S.Ct. 2254, 2259 (1975).

The Government argues that the guarantee, Exhibit 4, was the product of an independent investigation and that all information derived from the guarantee is free of taint.[80] However, this Court has concluded, *see*, page 8 of this opinion, that the discovery of the guarantee was directly related to the information obtained from Wolstencroft's briefcase. The Court holds that the guarantee and the evidence its discovery subsequently produced were "come at by the exploitation" of the Government's illegal action in searching and seizing Wolstencroft's briefcase.[81]

The Court therefore excludes[82] all evidence introduced in the case by the Government with the exception of Jack Payner's 1972 tax return, Exhibit 1, and the related testimony.[83]

---

[80] *See*, Government Memorandum of March 15, 1977.

[81] The Court notes that the Government did not argue that the guarantee, or the information discovered after the guarantee was found, was "so attenuated as to dissipate the taint." Nevertheless, the Court holds that the taint is not attenuated. *See, Wong Sun* v. *United States, supra*, 371 U.S., at 487-488.

[82] As Justice Holmes stated:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." *Silverthorne Lumber Co.* v. *United States, supra*, 251 U.S., at 392. *See also, Wong Sun* v. *United States, supra*, 371 U.S., at 416 (quoted with approval).

[83] The exclusion includes the testimony of all the Government's witnesses as it relates to information discovered as a result of the guarantee, notably the testimony of Robert Mintz, Mary Rhodenizer, Samuel Pierson, Carl Brownell, Jr., William Losner, and Susie Vrabel.

IT IS SO ORDERED.

/s/ John M. Manos
JOHN M. MANOS
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR76-305

UNITED STATES OF AMERICA, PLAINTIFF

v.

JACK PAYNER, DEFENDANT

[Filed April 28, 1977]

ORDER

Pursuant to the Opinion filed in this case today, which Opinion is fully incorporated in this Order, the Court grants Defendant Payner's motion to suppress, and orders suppressed all evidence introduced in the trial by the Government with the exception of Jack Payner's 1972 tax return, Exhibit 1, and the testimony relating to that document. This exclusion order suppresses the testimony of all the Government's witnesses as it relates to information discovered as a result of the guarantee, notably the testimony of Robert Mintz, Mary Rhodenizer, Samuel Pierson, Carl Brownell, Jr., William Losner, and Susie Vrabel.

IT IS SO ORDERED.

/s/ John M. Manos
JOHN M. MANOS
United States District Judge

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A MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD WAS MADE AND GRANTED. THAT IS WHY NO APPENDIX APPEARS AT THIS POINT.

Supreme Court, U. S.
FILED
JUN 18 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978

No. 78-1729

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK PAYNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1978

No. 78-1729

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK PAYNER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

Respondent accepts Petitioner's statement of opinions below.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction.

QUESTIONS PRESENTED

1. Whether the Court below properly exercised its Supervisory Power in excluding all evidence obtained as a result of the willful, intentional and outrageous criminal conduct by Government agents.

2. Whether evidence, obtained through the commission of criminal acts by Government agents, was properly suppressed under the Due Process Clause when the illegal conduct was outrageous and suppression was necessary in order to deter repetition of the criminal conduct.

STATEMENT OF FACTS

Respondent accepts the Government's statement of facts with the following additions and corrections:

When Operation Trade Winds first commenced with the use of over 30 informants in 1965 until April or May, 1974, the Government issued no subpoenas, search warrants or administrative IRS summons. This, in spite of the fact that in June, 1972 IRS suspected that Castle Bank in the Bahamas functioned as an illegal tax haven for American taxpayers and that it had an account with the Bank of Perrine in Florida.

However, a little over a year after the "briefcase caper", as it was labeled by the IRS (A. 318), a Federal Grand Jury issued subpoenas for witnesses and documents. As a result, a loan guaranty was produced by the Bank of Perrine allegedly executed by Respondent Payner and dated April 25, 1972 (A. 166). The Government concedes that this guaranty was the key to its case. Witness, Sam Pierson, former officer of the Perrine Bank, and all other

witnesses who testified at the trial for the Government and all documents introduced, except for Payner's tax returns, were discovered as a direct result of the illegal seizure in January, 1973.

The record indicates that Jaffe submitted a report on Project Haven to a committee of the United States Congress, which referred to the "Briefcase Caper," stating:

> "The information obtained from the informant was extremely valuable and was unavailable from any other source. It [the briefcase] provided the leads as to where to serve the grand jury subpoenas." (A. 243)

In granting the suppression motion, the District Court found that the Government had not met its burden of showing the suppressed evidence was not the fruit of its criminal conduct, which conduct the Court labeled as "both purposefully illegal and an intentional, bad faith act of hostility". The Court said:

> "Viewing Richard Jaffe's testimony as a whole, including his demeanor while presenting his testimony, . . . [that testimony] . . . was *unconvincing.*" (Petitioner's Appendix F, p. 30a)

The Court specifically found that:

> ". . . it was not coincidence that the Perrine Bank was served with subpoenas shortly after information in the briefcase had been examined and discussed throughout the I.R.S. districts in the United States." (Petitioner's Appendix F, p. 31a)

Consequently, the District Court concluded:

> "The Court finds that the briefcase seized on January 15, 1973 provided the leads which resulted in

the issuance of subpoenas to the Bank of Perrine in April and May, 1974. Further the Court finds that Exhibit 4 is a product of the seizure of January 15, 1973, and that the subsequent investigation and indictment of Jack Payner stemmed from the January 15, 1973 seizure." (*Id.* p. 32a)

The District Court based its suppression order upon the fact that because the Government's agent obtained the subject evidence by purposeful criminal conduct, perpetrated in bad faith hostility to constitutional rights, it violated Respondent's Due Process rights under the Fifth Amendment to the United States Constitution. The Court further held that, notwithstanding the Due Process violations, it was suppressing the subject evidence under its inherent Supervisory Powers. From this Order the Government appealed, and the appeal was dismissed on March 17, 1978 for lack of jurisdiction. *United States v. Payner*, 572 F.2d 144 (6th Cir., 1978).

In the Government's second appeal the Circuit Court affirmed the Order of the District Court based upon the District Court's Supervisory Powers, stating that it did not need to reach the Fifth Amendment issue. Of necessity, while not discussing the issue, the Circuit Court affirmed the District Court's finding that the suppressed evidence was tainted. That finding was based upon testimonial evidence and the fact that the Government had failed to introduce any evidence to meet its burden of proving an independent source or lack of taint.

REASONS FOR DENYING THE PETITION

I. UNDER ITS HISTORIC SUPERVISORY POWERS, CONSISTENT WITH THE RULINGS OF THIS COURT, THE TRIAL COURT PROPERLY EXCLUDED ALL EVIDENCE OBTAINED AS A RESULT OF THE WILLFUL, INTENTIONAL AND OUTRAGEOUS ILLEGAL CONDUCT ON THE PART OF THE GOVERNMENT AGENTS.

The Government in its Petition predicates its argument on the assertion that none of Respondent's Constitutional rights were violated by the use of the evidence obtained through a purposeful burglary. Such is clearly untrue. The District Court, relying on a long line of authority from this Court (as discussed *infra*), held that Respondent's Due Process rights under the Fifth Amendment were indeed violated both by the criminal conduct in obtaining the suppressed evidence and also in the use of such evidence in the trial. While the Government also asserts in its Petition that the subject evidence was not tainted, that matter was resolved by the District Court upon factual conclusions, based upon the evidence at the Suppression Hearing.

It should be noted by this Court that though the Government represents that the suppressed evidence was not tainted, it has stipulated in another pending case, *United States v. Baskes*, (No. 77 CR 238, N.D. Ill.), in which it used information from the "briefcase caper" to obtain its evidence and indictment, that:

> "While the government already knew Castle Bank and Trust had accounts at the American National Bank

and the Bank of Perrine, the impetus for these grand jury subpoenae stemmed from the information received from the briefcase." Paragraph 26.

A. The Government's Conduct in Perpetrating the "Briefcase Caper" Was Clearly Illegal.

As the District Court set forth in Footnote 66 of its Opinion below (A. 50, Petitioner's Appendix F, p. 48a), the actions of the Government operatives[1] in obtaining confidential bank records from the briefcase of Wolstencroft satisfy the elements of a *prima facie* case of criminal larceny under Florida law, Fla. Stat. Ann. §§812.011, 812.-021(1)(a) Fla. Stat. Ann. and 812.021(5) Fla. Stat. Ann. and Jaffe himself was guilty as a "principal". Fla. Stat. Ann. §777.011.

The District Court below further noted that:

> "The type of conduct which the government agents exhibited in connection with the 'briefcase caper' was so outrageous and improper that it probably satisfies the elements of F.S.A. Section 812.081 criminalizing the unauthorized appropriation of trade secrets, such as secret 'lists of customers' by copying such list without permission of the owner. See Section 812.081 (1)(c), (3)." (A. 50, n. 66, Petitioner's Appendix F, p. 48a)

That section carries a different penalty from that of larceny and is an independent crime.

---

1. Casper's actions were for the benefit of the IRS and he was paid $8,000.00 for his efforts by Jaffe, an employee of the IRS (A. 317).

B. The Affirmance of the Trial Court's Exercise of Its Supervisory Powers Was Consistent With This Court's Prior Rulings.

This case presents nothing new to this Court, as it is merely an example of a Federal Court's exercising its duty to exclude evidence which the Government obtained in a manner inconsistent with the American standard of justice. To not have exercised that power would have permitted the violation of the basic integrity of the Federal system of justice. In *McNabb v. United States,* 318 U.S. 332, 339-340 (1943), the Court stated:

> "It is true, as the petitioners assert, that a conviction in the Federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."
>
> * * * * *
>
> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The Trial Court properly determined that the conduct of the Government in the "briefcase caper" was ". . . purposefully illegal and an intentional bad faith act of hostility . . ." (A. 57). Government agents intentionally violated the law, having discussed the position that the Government now again asserts, that the intended targets of their illegal conduct would have no redress, as they would lack standing to claim any Fourth Amendment violation.

It has been a long-recognized duty of Federal Judges to take whatever action is necessary, including the imposi-

tion of the Exclusionary Rule to prevent the Federal Courts from being demeaned, through their use as a forum, to sanction lawlessness on the part of law enforcement officers. The exclusion of the evidence in question was the least that could be done to maintain the integrity of the judicial process.[2] As this Court said in *Mapp v. Ohio*, 367 U.S. 643, at 659 (1961):[3]

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

The recent decision of *United States v. Valencia*, 541 F.2d 618 (6th Cir., 1976), exemplified the duty of a Federal Court to protect the integrity of the Federal judicial system by excluding evidence obtained in a manner which would taint that system.[4]

---

2. Interestingly, the Government, while arguing that neither District nor Circuit Courts have the power to impose the limited remedy of excluding evidence obtained as a result of the illegal conduct of Government, concludes that both the District and Circuit Courts do have the ultimate power of dismissing indictments obtained by grossly improper Government conduct. The positions are clearly inconsistent.

3. See also, *Brown v. Illinois*, 422 U.S. 590 (1975); *Elkins v. United States*, 364 U.S. 206 (1960); *Nardone v. United States*, 302 U.S. 379 (1937); *Benanti v. United States*, 355 U.S. 96 (1957); *Mesarosh v. United States*, 350 U.S. 922 (1956); *Lopez v. United States*, 373 U.S. 427, *reh. den.*, 375 U.S. 870 (1963); *Ker v. California*, 374 U.S. 23 (1963); *Communist Party v. Subversive Activities Con. Bd.*, 351 U.S. 115 (1956).

4. In *Valencia*, a secretary to an attorney who was representing co-defendants of the movant passed confidential memoranda and other information to Federal officers. The Sixth Circuit held that any evidence which was the fruit of such grossly improper conduct, in violation of the attorney-client privilege, and which resulted in prejudice to the defendants, must be excluded under the Court's Supervisory Power. In *Valencia*, all fruits of such conduct were held to be inadmissible, *even though the attorney-client privilege which was violated was not the privilege of the parties seeking suppression.* The Court properly disregarded the fact that the privilege violated was not personal to the movant and remanded the case to the District Court to determine, specifically, which evidence was the fruit of the Government's improper conduct.

The case at bar presents an even stronger case for suppression than does *Valencia*. In *Valencia*, the only improper conduct by Government officials, outrageous as it was, was to induce a secretary to breach her employer's attorney-client privilege. In the case at Bar, Federal agents actually conspired to and committed various crimes in utter disregard of state and Federal law, knowing such conduct to be illegal, but with the misguided belief that the evidence that they obtained would not be subject to challenge.

The Government, in its Petition argues that a Federal Court's Supervisory Power to limit the introduction of evidence exists only in the absence of a relevant Act of Congress. The Government then cites Rule 402 of the Federal Rules of Evidence, which provides that:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

The Government asserts that, since Rule 402 does not prevent the admissibility of evidence obtained by illegal conduct so long as the Fourth or Fifth Amendment were not violated (which they claim were not), the Court cannot prevent the admission of such evidence solely under its Supervisory Powers. The same argument has been made previously by the Government and has been strongly rejected. In *United States v. Jacobs*, 547 F.2d 772, 777 (2d Cir., 1976), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978), the issue discussed was the admissibility of particular statements made to a grand jury. The Second

Circuit rejected the same Government argument as has been presented to this Court by stating:

> ". . . the Government takes the extreme position that by Rule 402 of the Federal Rules of Evidence (a Congressional enactment) relevant evidence is to be excluded solely in those cases where exclusion is required by 'the Constitution of the United States, by Act of Congress, by these Rules, by other rules prescribed by the Supreme Court, pursuant to statutory authority.' It offers no history to support the view that Congress was concerning itself with supervisory powers of the federal court. The obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent."

The Second Circuit clearly and properly interpreted Rule 402 as providing no basis to strip from the Federal Judiciary its historic power to supervise the Federal Judicial process by excluding evidence obtained in a manner that a Federal Court deems to be so grossly improper as to be a threat to the integrity of the entire Federal Judicial System. That position was implicitly followed by the Sixth Circuit herein. There exists no conflict among circuits and no reason for review.

The Government does not deny the illegal acts of its agents. Rather than attempt to justify its activities, the Government asserts that there is no remedy available to the Respondent. It is precisely to prevent the growth and development of this callous and lawless attitude on the part of our Government that Courts exercise their Supervisory Powers in excluding evidence.

In *Lopez v. United States*, 373 U.S. 427 (1963), this Court did state, as the Government cites in its Petition that:

> ". . . the Court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised." *Id.* at 440.

However, in the next sentence, this Court went on to state:

> "Its application in the present case, *where there has been no manifestly improper conduct by federal officials*, would be wholly unwarranted." *Id.* (Emphasis added)

In the instant case, Judge Manos, following the criteria of *Lopez*, made a specific finding that the actions of the federal agents were not merely "manifestly improper", but were "outrageous" and knowingly "illegal,"[5]

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5. Judge Manos also found:

> ". . . the Government's action in this case was both purposefully illegal and an intentional, bad faith act of hostility . . ." (A. 57, Petitioner's Appendix F, p. 62a)
>
> . . . .
>
> ". . . the United States . . . knowingly and willfully participated in the *unlawful* seizure . . . (A. 36, Petitioner's Appendix F, p. 25a)
>
> . . . .
>
> ". . . the United States was an active participant in the admittedly criminal conduct . . ." (A. 37, Petitioner's Appendix F, p. 26a)
>
> . . . .
>
> ". . . the illegal conduct of the government officials involved in this case compels the conclusion that they knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution. (A. 50, Petitioner's Appendix F, p. 48a)
>
> . . . .
>
> "The Activities of the Government agents [were] . . . outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country . . . (A. 51, Petitioner's Appendix F, p. 50a)
>
> . . . .
>
> "The need to deter gross illegal activity on the part of the Government, such as occurred in this case, is clear." *Id.*

unlike *Lopez* where there was ". . . no act of any kind which could justify the creation of an exclusionary rule."

Mr. Justice Powell, joined by Mr. Justice Blackmun in a concurring opinion in *Hampton v. United States,* 425 U.S. 484, 493 (1976),[6] foresaw the issue of this case, and used the term "outrageous police conduct" to describe instances where a District Court should exercise its Supervisory Powers. In Footnote 6, of his Opinion, Mr. Justice Powell observed that an analysis of the appropriate use of Supervisory Powers is like an analysis under the Due Process Clause, where the test is fundamental fairness under the circumstances. *Rochin v. California,* 342 U.S. 565 (1952).

The Government claims that this Court ought to grant its Petition for a Writ of Certiorari because, if the District Court indeed has Supervisory Powers, it is necessary for this Court to set rigid standards for the exercise of those powers.[7] However, as recognized by Mr. Justice Powell in *Hampton v. United States, supra* at 494 n.6, there are no "sharply defined standards" of "outrageous" government conduct. Each case must be judged "in light of all the circumstances". While in the proper case, where a District Court exercised its Supervisory Powers in a

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6. As Judge Rubin, in his dissenting opinion in *United States v. Leja,* 563 F.2d 244, 247 (6th Cir., 1977), stated:

> "It is clear from the concurrence and majority opinions in *Hampton v. United States,* that a majority of the United States Supreme Court recognized that there may be a level of egregious governmental participation in criminal activity that is proscribed, no matter how worthy the objective or how deceitful the adversary."

That level was clearly reached and surpassed in the instant case.

7. Contrary to the Government's assertion, the decision in *United States v. Baskes,* 442 F. Supp. 322, 333-334 (N.D. Ill., 1977), Appeal Pending (No. 17-2178, 7th Cir.), was based on the conclusion that the subject evidence was not tainted by the "briefcase caper".

"borderline" set of facts, review by this Court might be appropriate. No purpose would be served by this Court reviewing the District Court's exercise of its Supervisory Powers herein, as there is no dispute of the illegal and outrageous nature of the governmental conduct involved. Clearly, that is why the Court of Appeals found it unnecessary to comment in any more detail in its opinion.

II. EVEN WITHOUT CONSIDERATION OF THE TRIAL COURT'S SUPERVISORY POWERS, EVIDENCE OBTAINED THROUGH THE COMMISSION OF VARIOUS CRIMES BY GOVERNMENT AGENTS WAS PROPERLY SUPPRESSED BY THE TRIAL COURT IN ORDER TO PROTECT RESPONDENT'S DUE PROCESS RIGHTS.

A. The Government's "Bad Faith Hostility" to the Legal Process in Perpetrating the "Briefcase Caper" Resulted in a Clear Violation of Payner's Due Process Rights.

While the Circuit Court never had to reach the issue, Respondent deems it appropriate to at least discuss the fact that even if the District Court had not suppressed the tainted evidence on the basis of its Supervisory Powers, it also properly suppressed it pursuant to the Due Process Clause of the Fifth Amendment.[8] The Government asserts that the opinion of the Court of Appeals "proceeds on the assumption that the illegal search of Wolstencraft's briefcase did not violate any of Respondent's constitutional or statutory rights." (Petitioner's Brief, p. 11). That assertion is patently incorrect. The Court below stated that

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8. As recognized by Mr. Justice Powell in *Hampton, supra,* the analysis of suppression under the Court's Supervisory Powers follows in the same manner as the analysis under the Due Process Clause.

because it was affirming the Trial Court's exercise of its Supervisory Powers, it was "not necessary to reach the constitutional questions . . ." (Petitioner's Appendix A, p. 2a). The clear precedent for the exclusion by the Trial Court, of all evidence derived from the Government's illegal conduct followed from *Rochin v. California, supra.* Nothing new or worthy of this Court's consideration is presented in this case.[9]

The pivotal issue is whether the Government agents acted illegally and whether such illegality offended "those canons of decency and fairness which express the notion of justice of English speaking peoples even toward those

9. The words of Mr. Justice Frankfurter were quoted by the Trial Court as the basis for its decision:

> "Regard for the requirements of Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty'.
>
> . . . .
>
> Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts, exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." 342 U.S. at 169, 172. (Citations omitted)

charged with the most heinous offenses . . .", *id.* at 169.[10]

While the Trial Court recognized that a mere technical violation of the law or conduct committed in good faith, which subsequently proves to be illegal, is not a basis for exclusion of evidence based upon Due Process grounds, *Brown v. Illinois, supra* (Justice Powell concurring); *Brewer v. Williams,* 430 U.S. 387 (1977) (C. J. Berger, dissenting), *reh. den.,* 431 U.S. 925 (1977), the Trial Court properly held that where the Government's illegal conduct was done knowingly and purposefully in "bad faith hostility" to any person's fundamental rights, then society has a strong interest in excluding such evidence in order to deter repetition of such outrageous conduct.

B. In Order to Give Meaning to Respondent's Due Process Rights and to Deter Future Outrageous Conduct by the Government Such As the "Briefcase Caper" All Evidence Illegally Obtained Was Properly Suppressed.

In *United States v. Janis,* 428 U.S. 433 (1976), *reh. den.,* 429 U.S. 874 (1977), this Court enunciated the balancing test which must be applied in invoking the Exclusionary

10. In *United States v. Russell,* 411 U.S. 423 (1973), a Government undercover agent provided a chemical to a defendant who used it to manufacture illegal drugs. The Supreme Court, in finding that *the Government had done nothing illegal,* and had not infringed upon the Due Process Clause, refused to dismiss the indictment. However, the Court specifically stated:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-432.

Rule. The Court stated that evidence should be excluded when there is a showing that there exists, " 'a sufficient likelihood of deterring the [unlawful] conduct of the State [Federal] police so that it [the social benefit exclusion] outweighs societal costs imposed by exclusion'." The District Court quite correctly applying the *Janis* test found that:

> ". . . [S]ociety's interest in deterring the Due Process violations outweighs society's interest in allowing the fact finder to view all relevant evidence only when an official's conduct demonstrates bad faith hostility to the strictures imposed on him by the Constitution." (A. 49)

This District Court concluded that:

> "The activities of the Government agents Jaffe and Casper were outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all likeminded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit."[11] (A. 51, Petitioner's Appendix F, p. 50a)

The suppression of any evidence derived from the "briefcase caper" is mandated by the need to deter such grossly illegal activity on the part of the Government. As Mr. Justice Brandeis stated in *Olmsted v. United States*, 277 U.S. 438, 485 (1927):

---

11. See also, *Elkins v. United States*, 364 U.S. 206, 217, 222 (1960); *United States v. Peltier*, 422 U.S. 531, 537-538 (1975); *United States v. Janis*, *supra*, 466; *Mapp v. Ohio*, *supra*, 659; *Brown v. Illinois*, *supra*, 599.

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

This Court stated with regard to the Rule's deterrence rationale:

> "The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins*, *supra*, 217.

The District Court found that it was clear from the testimony that the only practical way to deter the type of conduct exhibited by Jaffe and Casper on behalf of the Government would be to suppress the evidence that they obtained (A. 54). In fact, there were even discussions among IRS agents that persons whose names were obtained from Wolstencroft's briefcase could not attack the illegal search (A. 363-366).

The Trial Court correctly applied the rationale of *Michigan v. Tucker,* 417 U.S. 433, 447 (1974), "to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused."

The attitude of those involved in planning the "briefcase caper", based upon the belief that the illegal conduct would not in any way affect the admissibility of evidence obtained, is exactly what Justice Frankfurter in *Rochin* sought to eliminate. Since, according to the Government's view, the only person who would have any standing to contest the admissibility of evidence derived from the "briefcase caper" was Wolstencroft, and since at the time of the "caper", the Government had no intention of taking any action against Wolstencroft, without the suppression of such evidence, there would be no deterrent whatsoever to repeated criminal actions on the part of IRS and other Government agencies.[12]

As this Court has repeatedly recognized, without the deterrent of the application of the Exclusionary Rule under the Fifth Amendment, Due Process Clause (and under the Court's inherent Supervisory Powers), Government agents would be free to randomly and openly commit gross criminal violations against persons, whom the Government has no intention of prosecuting, in order to obtain

12. The District Court determined from the record as constituted, that the IRS possessed sufficient information regarding the use, by one Allan Palmer, of the Castle Bank to hide illegal income, combined with information from Casper, that Wolstencroft would be entering the United States with Castle Bank depositors' records, to obtain a valid search warrant for those records (A. 40, n.55, Petitioner's Appendix F, p. 31). *United States v. Manufacturers National Bank of Detroit,* 536 F.2d 699 (6th Cir., 1976), *cert. den.,* 429 U.S. 1039. Therefore, not only was the conduct of the Government agents willful, intentionally illegal and a clearly outrageous violation of the American concept of justice, but it was totally unnecessary.

evidence against persons, who would have no standing to challenge such evidence. In a nation of laws, the Government cannot be permitted to recklessly disregard the rights of individuals and the laws which govern all persons, Government agents as well as private citizens. Without the limitations applied by the Exclusionary Rule, as consistently approved by this Court, such conduct would be repeated over and over again, thereby allowing our Government, whose prime responsibility is the protection of the rights of its citizens, to become the prime violator of those rights. However, with the law clearly enunciated by prior decisions of this Court, and consistently followed by the Courts below, there is no need for this Court to consider the facts in this case, which are even more extreme than those in the cases where it has previously approved the application of the Exclusion Rule.

CONCLUSION

Since this case presents no issue which has not already been decided and resolved by this Court, Respondent respectfully requests that this Court deny the Government's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

CONSTITUTION AND STATUTES INVOLVED

United States Constitution - Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution - Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Florida Statutes Annotated §777.011:

"Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and

punished as such, whether he is or is not actually or constructively present at the commission of such offense."

Florida Statutes Annotated §812.011:

"(1) 'Property' means anything of value, including, but not limited to, real estate, tangible and intangible personal property, contract rights, evidences of debt, choses in action and other interests in or claims to wealth, admission or transportation tickets, animals, food and drink, transient accommodations at any public lodging establishment, and gas, water, and electric and other power and telephone service."

Florida Statutes Annotated §812.021(1)(a):

"(1) A person who with intent unlawfully to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any other than the true owner, any property;"

Florida Statutes Annotated §812.021(5):

"It shall be sufficient for any indictment, information, or warrant returned, filed, or issued under this section to charge generally that the defendant, at the

time and in the county specified, did steal the personal or real property, thing in action, evidence of debt or contract, or article of value out of which the prosecution arose, describing the same in general terms and alleging generally the ownership and value thereof. It shall not be necessary when alleging the larceny of property over a period of time that the exact date or dates the property was taken be alleged, but instead the total period of time may be alleged generally. This section shall not be construed as intending to interfere with the power of the court to require the state to furnish the defendant with a bill of particulars in proper cases and on sufficient showing that cause exists for the same."

Florida Statutes Annotated §812.081:

"(1) As used in this section and §812.091:

(a) 'Article' means any object, device, machine, material, substance, or composition of matter, or any mixture or copy thereof, whether in whole or in part, including any complete or partial writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, map or copy thereof.

(b) 'Representing' means completely or partially describing, depicting, embodying, containing, constituting, reflecting, or recording.

(c) 'Trade secret' means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. 'Trade secret' includes any scientific, technical,

or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;

2. Of value;

3. For use or in use by the business; and

4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(d) 'Copy' means any facsimile, replica, photograph, or other reproduction in whole or in part of an article and any note, drawing, or sketch made of or from an article or part or portion thereof.

(2) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

(3) In a prosecution for a violation of the provisions of this section, it is no defense that the person so charged returned or intended to return the article so stolen, embezzled, or copied."

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No. 78-1729

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JACK PAYNER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 590 F.2d 206. An earlier opinion of the court of appeals (Pet. App. 12a-16a) is reported at 572 F.2d 144. The order of the district court (Pet. App. 5a-11a) is unreported. The original opinion of the district court (Pet. App. 17a-65a) is reported at 434 F. Supp. 113.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a) was entered on January 12, 1979. A petition for

rehearing was denied on March 20, 1979 (Pet. App. 4a). On April 9, 1979, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including May 18, 1979. The petition was filed on that date and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court possesses and should have exercised supervisory power to suppress evidence allegedly obtained as the result of an illegal search that did not violate respondent's rights under the Fourth Amendment.

STATEMENT

In September 1976, respondent was indicted in the United States District Court for the Northern District of Ohio on a charge of knowingly and willfully making a false statement in a matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001. In particular, respondent was accused of falsely stating on his 1972 federal income tax return that he did not have a foreign bank account, when in fact he knew that during 1972 he did have such an account at the Castle Bank and Trust Company in Nassau, Bahamas (Pet. App. 17a-18a & n.1; A. 4).[1]

[1] "A." refers to the appendix in the court of appeals.

1. The critical piece of evidence in the government's case against respondent was a loan guaranty agreement, dated April 28, 1972, in which respondent pledged the money in his Castle Bank account as security for a $100,000 loan extended by Castle Bank to Conel Development Inc., a Michigan land development project (Pet. App. 29a; A. 229). Castle Bank made the loan through one of its correspondent banks in the United States, the Bank of Perrine in Perrine, Florida (A. 159-169). The loan guaranty agreement was produced by the Bank of Perrine in response to government subpoenas, issued in April and May 1974, requesting the production of all documents concerning the Bank of Perrine's dealings with Castle Bank (Pet. App. 29a). Other important evidence was provided by Samuel Pierson, the former president of Castle Bank, who testified that at the time the loan guaranty was executed he checked the balance in respondent's account at Castle and found that it contained more than $100,000 (A. 164).

Before trial, respondent moved to suppress the loan agreement and the related testimony of Pierson and other government witnesses on the ground that the evidence had been obtained as the result of an illegal search conducted in Miami, Florida, in January 1973. The item searched was a briefcase belonging to Herbert Michael Wolstencroft, an officer of the Castle Bank who was visiting the United States.[2]

[2] The second count in respondent's indictment (A. 5) charged Wolstencroft with aiding and abetting the false statement offense by submitting to the Internal Revenue

The person primarily responsible for the search was Norman Casper, a private investigator working with the encouragement and assistance of Special Agent Richard Jaffe of the Internal Revenue Service.

Casper had met Wolstencroft several months earlier at Castle Bank's office in Nassau. Casper had traveled to the Bahamas on that occasion in an attempt to obtain information that might be helpful to the IRS in its long-standing investigation into American taxpayers' use of secret foreign bank accounts as illegal tax havens.[3] When Casper spoke with Wolstencroft in Nassau, he saw what appeared to be a computerized list of depositors' names. Casper informed Agent Jaffe of what he had seen, and Jaffe asked him to acquire a copy of the list (Pet. App. 20a; A. 226, 280-282).

After his initial meeting with Wolstencroft, Casper remained in "almost * * * constant touch" with the Castle Bank officer (A. 284). On at least two occasions prior to January 1973, Wolstencroft traveled to the United States, and Casper, at Wolstencroft's request, introduced him to women in Miami (A. 290). The second woman to whom Casper introduced Wolstencroft was Sybil Kennedy, a private investigator who had worked with Casper previously (A. 289-290). In January 1973, in conversations with Wolstencroft, Casper learned that the bank officer would be traveling through Miami on his way to Chicago and that he would be carrying a briefcase filled with important Castle Bank records (Pet. App. 21a; A. 285-286). Casper devised a plan by which he could, with Kennedy's help, obtain access to the information in the briefcase (A. 292-293).

Casper's scheme worked successfully. On January 15, 1973, Wolstencroft arrived in Miami, visited Kennedy at her apartment, and then went to dinner with her at a restaurant. While they were away, Casper entered the apartment with a key Kennedy had

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Service an affidavit confirming that respondent did not have an account at Castle Bank. Wolstencroft, a Bahamian resident, did not return to the United States to answer the indictment.

[3] The IRS investigation, known as Operation Trade Winds, began in 1965. In March 1972, IRS investigators in San Francisco, California, discovered that Allan Palmer, a suspected narcotics trafficker, had deposited into his personal bank account three checks drawn to his order by Castle Bank on its account at the American National Bank in Chicago (Pet. App. 19a; A. 215). In May 1972, the San Francisco investigators informed Agent Jaffe of their discovery and requested any information Jaffe might be able to obtain concerning the source of Palmer's funds at Castle Bank. Agent Jaffe knew that the Bank of Perrine was one of Castle Bank's correspondent banks in the United States, and he also knew that Casper was friendly with F. Eugene Poe, the President of the Bank of Perrine and one of Castle Bank's directors (A. 222-224, 244-245, 280-281). Agent Jaffe asked Casper to learn what he could about Palmer's account at Castle Bank, and Casper turned for assistance to his friend Poe. Poe introduced Casper to Pierson, the President of Castle Bank, and Pierson in turn referred Casper to Wolstencroft (A. 280). Wolstencroft informed Casper that Palmer had opened an account at Castle Bank with $15,000 deposited through the Bank of Perrine. Wolstencroft also disclosed that in June 1972 the balance in Palmer's account was $25,000 (Pet. App. 19a). Casper reported this information to Agent Jaffe, and Jaffe forwarded it to the IRS agents in San Francisco investigating Palmer (A. 216-217, 340).

supplied him and took Wolstencroft's briefcase to a locksmith, who made a key to open it. Casper then delivered the briefcase to Agent Jaffe, who supervised the copying of the Castle Bank records contained therein. Casper replaced the briefcase and its contents in Kennedy's apartment before she and Wolstencroft returned from dinner (Pet. App. 21a-24a; A. 297-300, 306-314, 348-359).[4] The IRS paid Casper $8,000 in cash for his services, and Casper in turn paid Kennedy $1,000 (Pet. App. 25a; A. 316-317, 323-324, 367-368).

Among the documents included in the briefcase were lists of Castle Bank depositors (A. 228). Respondent's name appeared on one of the lists (Pet. App. 28a; A. 236-237, 245-246, 250-251). Wolstencroft's briefcase also contained a number of documents referring to the Bank of Perrine and reflecting that bank's business dealings with Castle Bank (Pet. App. 29a; A. 255). After examining the contents of the briefcase, Agent Jaffe began to make inquiries regarding many persons whose names appeared in the photographed materials. In November 1973, when

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[4] In the week before the briefcase search, Casper told Agent Jaffe that he might be able to provide some information if Jaffe could arrange for photographic services. He also told Agent Jaffe that he would be "going into an apartment" to get a briefcase that would contain the documents to be copied (Pet. App. 21a; A. 288, 306-309, 325-326, 356, 373). Agent Jaffe obtained his supervisor's approval for the operation and arranged for another IRS agent to vouch for Casper to the locksmith whom Casper had hired to make the key for the briefcase. At the time, Agent Jaffe did not know what use Casper planned to make of the locksmith (Pet. App. 21a-22a; A. 308-311, 350-351, 356, 373).

Agent Jaffe contacted the IRS district office in Cleveland, Ohio, and asked about respondent, he learned that respondent had already been under investigation for nearly nine months for possible criminal income tax violations during the years 1968 through 1971 (Pet. App. 29a; A. 238). Agent Jaffe reported that he had "unsubstantiated information" indicating that respondent maintained an account at Castle Bank (A. 261-262). IRS Special Agent Joseph Sabol, the case agent from Cleveland, visited Agent Jaffe in Miami, and Jaffe showed him a copy of the Castle Bank depositor list that included respondent's name (A. 262-264). After reviewing this material and the other information it had gathered concerning respondent's tax returns for 1968 through 1971, the IRS Cleveland office discontinued its criminal investigation due to insufficient evidence (A. 104, 242, 256-259, 264). The final report that concluded the investigation was dated April 9, 1974 (Pet. App. 29a; A. 264).

Thereafter, the Department of Justice began a grand jury investigation in Miami into possible criminal tax violations involving the improper use of secret foreign bank accounts (A. 239). In late April and early May 1974, the grand jury issued subpoenas to the Bank of Perrine requesting the production of all records pertinent to the bank's dealings with Castle Bank (Pet. App. 29a; A. 240). The critical loan guaranty agreement was produced in response to one of these subpoenas and, in July 1974, Agent Jaffe notified the IRS Cleveland district office of the discovery of evidence of respondent's Castle Bank

account. As a result of this new information, the Cleveland office in October 1974 opened the investigation that led to respondent's indictment (Pet. App. 29a-30a; A. 111, 229-232, 240-241, 265).

2. In view of respondent's waiver of his right to a jury trial, the district court, with the agreement of the parties, decided to consolidate its consideration of respondent's pretrial motion to suppress with the trial on the merits (Pet. App. 18a & n.2). The government did not introduce or attempt to introduce any of the materials taken from Wolstencroft's briefcase and photographed in January 1973. At the close of the evidence, the district court concluded that respondent lacked standing under the Fourth Amendment to challenge the legality of the 1973 search (*id.* at 38a-39a, 46a n.65). The court stated that respondent "possessed no privacy interest in the Castle Bank documents seized from Wolstencroft" (*id.* at 38a). Nonetheless, the court suppressed the loan guaranty agreement and "the testimony of all the Government's witnesses as it related to information discovered as a result of the guarantee" (*id.* at 66a). The only government evidence not suppressed was respondent's 1972 tax return and the testimony relating to that document (*ibid.*).

The district court held first that the disputed evidence, although not obtained in or derived directly from the search, was tainted by the search's illegality (Pet. App. 30a-32a, 63a-64a). The court ruled that the government "did not meet its burden to show that [the critical evidence] was the product of an investigation *independent* of the information taken"

in the illegal search (*id.* at 30a). The court further held that the government agents' conduct in encouraging and performing the illegal search demonstrated a "knowing and purposeful *bad faith hostility* to [a] person's fundamental constitutional rights" (*id.* at 46a, 48a-50a, 56a). Accordingly, the court concluded, the Due Process Clause of the Fifth Amendment requires suppression of the challenged evidence, notwithstanding respondent's inability to assert any violation of his rights under the Fourth Amendment (*id.* at 46a-48a n.65, 55a-56a).

In the alternative, the district court held that "the federal courts' supervisory power over federal prosecutions should be invoked to exclude evidence obtained by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right" (Pet. App. 58a-61a; footnotes omitted). The court ruled that the government's action in connection with the search of Wolstencroft's briefcase satisfied these criteria and that therefore all evidence obtained as a result of the search "must be excluded under this Court's supervisory function" (*id.* at 63a). The court candidly acknowledged (*id.* at 57a n.72) that it relied on the Due Process Clause as well as its supervisory power "because the Government might well argue that supervisory power to exclude is limited to these instances specified under the federal criminal rules." [5]

[5] Initially, the district court did not enter a verdict. The government asked the court to vacate its order suppressing the loan guaranty agreement, to reach a verdict based on all

3. The court of appeals affirmed in a brief per curiam opinion. The court's entire discussion of the validity of the district court's suppression order was as follows (Pet. App. 2a):

> Upon consideration of the briefs and arguments of counsel and the entire record, we conclude that the district court did not err in suppressing the evidence in the exercise of its supervisory powers. We agree with the district court that suppression was justified. Since we base our decision upon the exercise of supervisory powers, it is not necessary to reach the constitutional questions raised on the appeal.

The court did not address the government's contention that the disputed evidence was not tainted by the search of Wolstencroft's briefcase.

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the evidence, and then, if the verdict were guilty, to consider anew its decision on respondent's motion to suppress and to set aside the conviction if the court continued to believe that the motion should be granted and there was no sufficient independent evidence to support the verdict (A. 60-64). The court refused because it believed its suppression order was appealable before verdict. The government then appealed and also filed a petition for a writ of mandamus, seeking to compel the district court to follow the course described in the government's posttrial motion and thereby to preserve the government's right to appeal. The court of appeals dismissed the appeal for lack of jurisdiction and denied the petition for a writ of mandamus (Pet. App. 12a-16a). When the case was returned to the district court, that court vacated its earlier order suppressing the evidence, entered a verdict of guilty, and then reinstated its suppression order and set aside the verdict (*id.* at 5a-11a).

SUMMARY OF ARGUMENT

I

Congress has provided that federal courts may properly exclude relevant evidence only in order to implement the Constitution, a statute, or a statutorily authorized rule. "Congress has undoubted power to regulate the practice and procedure of federal courts" (*Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941)), and it has exercised that power in enacting Fed. R. Evid. 402. Rule 402 provides that all relevant evidence is admissible, "except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." The legislative history of Rule 402 demonstrates that the Rule was carefully drawn to confine the exclusion of relevant evidence to those occasions when it could be justified under one of the specifically enumerated exceptions to the general principle of admissibility.

The district court and court of appeals have suppressed critical evidence of respondent's guilt, even though, as the district court conceded, none of respondent's rights were violated by the search of Wolstencroft's briefcase. The court of appeals acted solely on the basis of its "supervisory power" and did not review the district court's alternative holding that use of the loan guaranty agreement and related testimony against respondent at trial would violate his rights under the Due Process Clause of the Fifth

Amendment. The court of appeals thus sustained the exclusion of relevant evidence on grounds wholly independent of the Constitution, federal statutes, and rules prescribed by this Court under statutory authority. This departure from the clear command of Fed. R. Evid. 402 should be rejected.

II

Even assuming that Rule 402 does not preclude the suppression of relevant evidence for reasons other than those expressly mentioned therein, the court of appeals erred in exercising its supervisory power in this case. The court's holding was inconsistent with numerous decisions of this Court establishing that only persons who have themselves been the victims of an illegal search or seizure are entitled to invoke the exclusionary rule as a sanction for the Fourth Amendment violation. See, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978); *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969). Here, respondent's Fourth Amendment rights were not violated by the search of Wolstencroft's briefcase. Respondent had no privacy interest in the contents of the briefcase and, indeed, the record does not suggest that respondent even knew Wolstencroft or was aware of his business trip to the United States. The court of appeals has thus used its supervisory power to accomplish a result contrary to that ordained by this Court's decisions under the Fourth Amendment, the very constitutional provision designed to protect against unreasonable searches and seizures. The supervisory

power should not be employed to avoid this Court's salutary restrictions on the applicability of the exclusionary rule as a Fourth Amendment remedy.

Viewed apart from the Fourth Amendment context, the court of appeals' ruling is improper, because it represents a judicial attempt to supervise the investigative activities of Executive Branch officers by reference to standards not provided by Constitution, statute, or rule, but developed by the courts themselves. Where the focus of inquiry has been law enforcement officers' conduct outside the judicial arena, this Court has never imposed sanctions solely on the basis of judicial aversion to or displeasure with police tactics. Rather, evidence has been excluded only where the challenged official behavior has violated some policy embodied in a constitutional provision, a statute, or a federal rule. See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332 (1943); *Mallory* v. *United States*, 354 U.S. 449 (1957). To the extent the court of appeals has asserted a power to exclude relevant evidence whenever it is obtained through police investigative conduct that is objectionable only because it does not comport with a judicial sense of propriety, the court has displayed an inadequate regard for the constitutional separation of powers, and its decision should be reversed.

This conclusion is especially compelling because the court of appeals' summary opinion gives the district courts in the Sixth Circuit no guidance concerning the appropriate occasions for future exercise of the supervisory power. Assuming such judicial power

exists at all in circumstances like those presented here, it should be used only to set clear standards of acceptable conduct that will govern in later cases. The court of appeals' failure to provide such instruction suggests that the court incorrectly viewed the supervisory power as a justification for the exercise of an essentially ad hoc judicial veto over distasteful police practices.

ARGUMENT

I

CONGRESS HAS VALIDLY RESTRICTED THE GROUNDS FOR EXCLUSION OF RELEVANT EVIDENCE IN THE FEDERAL COURTS TO ENFORCEMENT OF THE CONSTITUTION, A STATUTE, OR A STATUTORILY AUTHORIZED RULE

A. Congress Is Empowered To Enact Legislative Criteria Governing The Admission Of Evidence In Federal Trials

The supervisory power of the federal courts is merely one aspect of the more general judicial power to establish rules of procedural and substantive law in appropriate cases when neither the Constitution nor Congress has answered the particular question at issue. Courts typically have invoked the phrase "supervisory power" in the context of cases raising questions about the proper administration of judicial proceedings. See, *e.g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 599 (1978) (approving district court's discretionary denial of public access to its own records and files); *United States* v. *Hale*, 422

U.S. 171, 180-181 & n.7 (1975) (barring cross-examination of criminal defendant about his silence at time of arrest); *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966) (plurality opinion) (requiring jury trial or waiver thereof as precondition to sentence of more than six months in federal criminal contempt proceeding); *Offutt* v. *United States*, 348 U.S. 11, 13 (1954) (ordering retrial of contempt proceeding before different judge); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225 (1946) (forbidding systematic exclusion of daily wage earners from federal jury panel); *Mortensen* v. *United States*, 322 U.S. 369, 371-372 (1944) (treating district court transcript as part of appellate record despite failure to file a timely bill of exceptions); *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 676-678 (1944) (restoring judgment of district court where Supreme Court review of court of appeals' reversal was frustrated by dissolution of corporate respondent).

But these cases do not by any means exhaust the occasions on which federal courts have made legal rulings in the absence of controlling constitutional or statutory commands. In numerous such instances, the court's opinion has made no reference to "supervisory power," [6] and sometimes such a reference has

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[6] See, *e.g.*, *Weeks* v. *United States*, 232 U.S. 383 (1914) (implementing Fourth Amendment by suppressing evidence obtained in illegal search by federal officer); *Brown* v. *United States*, 256 U.S. 335 (1921) (prescribing self-defense instruction making failure to retreat only one circumstance to be considered in determining whether defendant's use of force was justifiable); *Clearfield Trust Co.* v. *United States*,

been omitted even where the decision plainly concerned the proper method of conducting a judicial proceeding. See, *e.g.*, *Funk* v. *United States*, 290 U.S. 371 (1933) (establishing federal evidentiary rule that a wife is competent to testify on behalf of her husband); *Aldridge* v. *United States*, 283 U.S. 308 (1931) (regulating voir dire by requiring trial court to examine prospective jurors about possible racial prejudice); *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896) (approving supplementary jury instruction urging dissenting jurors to reexamine their views "with a proper regard and deference" to the opinion of the majority).

On the other hand, courts have on some occasions explicitly invoked their supervisory power even where their primary objective was undoubtedly the enforcement of some behavioral standard governing conduct

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318 U.S. 363 (1943) (describing rights of United States as drawee of commercial instrument bearing forged endorsement of payee); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (recognizing district court's power to compel arbitration of labor dispute); *Woodby* v. *INS*, 385 U.S. 276, 284-286 (1966) (establishing proper burden of proof in administrative deportation proceeding); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) (recognizing private action against individual federal officers as available method for enforcing Fourth Amendment); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (establishing priority rules for ordering private liens and federal contractual liens arising from government loan programs). See generally P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 756-832 (2d ed. 1973); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

outside the judicial arena. See, *e.g.*, *McNabb* v. *United States*, 318 U.S. 332 (1943) (suppressing confession obtained after two days of custodial interrogation prior to arraignment, a police practice found to violate a federal statute); *Rea* v. *United States*, 350 U.S. 214, 216-217 (1956) (enjoining federal officer from testifying in state criminal case about evidence obtained from defendant's premises during federal search supported by warrant improperly issued under Fed. R. Crim. P. 41(c)); *Elkins* v. *United States*, 364 U.S. 206, 216 (1960) (in federal criminal trial, suppressing evidence illegally obtained by state officers in search that violated the Fourteenth Amendment).

This survey suggests that the federal courts' supervisory power, properly viewed, is not some special judicial creation superimposed on the power to resolve individual cases and controversies, but is merely a somewhat ill-defined segment of that power. It is an aspect of the courts' power most frequently mentioned in cases involving matters of judicial administration, but at times invoked to justify the implementation of constitutional or statutory provisions through means not prescribed by the Framers or Congress. In short, if the supervisory power is distinctive in any way, it is so not as a special *kind of power*, but rather as a label that denotes the exercise of judicial power in a certain *kind of case*, *i.e.*, a case in which the matter at issue is an element of judicial procedure not directly regulated by Constitution, statute, or rule.

Nothing in the Constitution excepts such subject matter from the legislative powers otherwise conferred on Congress or provides that the judiciary is vested with the ultimate lawmaking power in such areas. It is, instead, well established that Congress is constitutionally empowered to prescribe rules of evidence, consistent with constitutional guarantees, as a necessary and proper adjunct to the exercise of the powers that enable it to proscribe federal criminal offenses and to provide for their prosecution in federal courts. See, *e.g.*, *Hawkins* v. *United States*, 358 U.S. 74, 78 (1958).

It follows that, where either the Constitution or Congress has spoken, courts are not free to substitute their own rules of decision merely because they believe that, as an a priori matter, some alternative to the constitutional or statutory scheme is preferable. Because the supervisory power is simply an aspect of the general judicial power to decide cases and controversies, it does not entail any authority to displace legislative rules in favor of judicially-created ones, except perhaps when a court finds that a statute violates the Constitution. Supervisory or otherwise, the judicial power to fashion legal rules is subordinate to the paramount authority of Congress to legislate within constitutional bounds. That congressional authority includes the power to prescribe the practices and procedures that will govern trials in the federal courts. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1940). As the Court observed in *United States* v. *National City Lines*, 334 U.S. 573, 589 (1948),

"[o]ur general power to supervise the administration of justice in the federal courts * * * does not extend to disregarding a validly enacted and applicable statute or permitting departure from it * * *." Accord, *Palermo* v. *United States*, 360 U.S. 343, 353 n. 11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress"); *Gordon* v. *United States*, 344 U.S. 414, 418 (1953); *Upshaw* v. *United States*, 335 U.S. 410, 414-415 (1948) (dissent); *Wolfle* v. *United States*, 291 U.S. 7, 13 (1934); *Funk* v. *United States*, *supra*, 290 U.S. at 374-375, 379, 382; *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 61 (1825). See also Hill, *The Bill of Rights and The Supervisory Power*, 69 Colum. L. Rev. 181, 203 & n.124 (1969); Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of Federal Courts*, 72 Nw. U. L. Rev. 595, 628 (1977).

The first critical question, then, with respect to the court of appeals' exercise of supervisory power in this case is whether that action runs counter to a specific congressional command. We submit that it does.

B. Rule 402 Of The Federal Rules Of Evidence Prohibits The Suppression Of Relevant Evidence, Except Pursuant To Statute, Constitution, Or Statutorily Authorized Rule

When *Funk* v. *United States*, *supra*, was decided in 1933, its primary significance lay in its rejection

of the proposition that the rules of evidence applicable in a federal criminal trial must track the common-law rules existing in the state in which the trial was held at the time that state was admitted to the Union. 290 U.S. at 379-380. Instead, *Funk* affirmed the power of the federal courts, "in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common-law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced." *Id.* at 383.[7]

In 1940, Congress authorized this Court to prescribe "rules of pleading, practice, and procedure" for federal criminal cases (54 Stat. 688, 18 U.S.C. (1940 ed.) 687), and in 1945, the Court codified the holding in *Funk* by promulgating Fed. R. Crim. P. 26, 18 U.S.C. (1970 ed.) App., page 4502. The second sentence of Rule 26 provided:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

The accompanying Advisory Committee Note acknowledged the Rule's relationship to *Funk* and

[7] For a contemporary appraisal of the significance of *Funk*, see Note, *Rules of Evidence in Federal Criminal Trials*, 47 Harv. L. Rev. 853 (1934).

stated that the Rule "contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal courts." For the next 30 years, the federal courts labored, with only limited success, to achieve this goal by fashioning and applying appropriate evidentiary standards on a case-by-case basis. See Special Committee on Evidence, Judicial Conference of the United States, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 73, 92, 98-100 (1962).[8]

[8] In *Michelson* v. *United States*, 335 U.S. 469, 486 (1948), this Court described its own special problems in exercising meaningful control over the development of evidentiary rules in the lower federal courts:

> This Court * * * has contributed little to * * * the law of evidence, for the reason, among others, that it has had extremely rare occasion to decide such issues, as the paucity of citations in this opinion to our own writings attests. It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be.
>
> We concur in the general opinion of courts, textwriters, and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other. But somehow it has proved a workable even if clumsy system when moderated by discretionary controls in the hands of a wise and strong trial court. To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.

See also *id.* at 487-488 (Frankfurter, J., concurring).

The situation changed dramatically in 1975, when Congress enacted the Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926. The Rules manifested a congressional intent to prescribe a uniform code of evidence for use in the federal courts and to limit the occasions on which common-law development of evidentiary rules by the courts themselves would be necessary or appropriate. Adoption of the Rules eliminated the authority of the federal courts to render evidentiary decisions at odds with the standards set by Congress. This Court witnessed the shift as early as 1972 when, in conjunction with the promulgation of its proposed Rules of Evidence, it adopted the Advisory Committee's recommendation that Fed. R. Crim. P. 26 be amended to change its title from "Evidence" to "Taking of Testimony" and to delete the second sentence of the Rule, reprinted above (page 20, *supra*). See 56 F.R.D. 183, 359 (1972); 51 F.R.D. 315, 472 (1971). The Advisory Committee explained that the sentence should be deleted "because the Rules of Evidence govern admissibility of evidence, competency of witnesses, and privilege." When Congress enacted the Rules of Evidence into law, it "expressly approve[d]" the amendment to Fed. R. Crim. P. 26, thus reflecting the legislative understanding that the Rules would displace the common-law judgments of the courts on evidentiary matters. 88 Stat. 1949; H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 1 (1973).

For purposes of the present case, the key provision in the Federal Rules of Evidence is Rule 402. The Rule states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

This Rule prohibits the exercise of any supervisory power that the district court might otherwise have invoked in respondent's trial to suppress the evidence derived from the search of Wolstencroft's briefcase. The Rule was designed to bar the exclusion of relevant evidence, except where such judicial action is deemed appropriate for the enforcement of a constitutional provision, a statute, or a statutorily authorized rule. The court of appeals in this case expressly disclaimed any reliance on the Constitution, and neither the district court nor the court of appeals suggested that the loan guaranty agreement signed by respondent should be suppressed in order to implement a federal statute or a rule prescribed by this Court pursuant to statutory authority.[9] Accordingly, the court of appeals' decision was incorrect.

The limited legislative history of Rule 402 shows that Congress chose its language carefully and in-

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[9] Fed. R. Crim. P. 41 provides that a person aggrieved by an unlawful search and seizure may move to suppress evidence obtained as the result of the illegality, but neither the district court nor the court of appeals suggested that respondent was aggrieved, within the meaning of Rule 41, by the search of Wolstencroft's briefcase. See *Alderman* v. *United States*, 394 U.S. 165, 173 n.6 (1969); *United States* v. *Calandra*, 414 U.S. 338, 348-349 n.6 (1974).

tended to prohibit the suppression of relevant evidence, unless grounded in some constitutional or statutory authority. See C. Wright and K. Graham, *Federal Practice and Procedure: Evidence* §§ 5191, 5192, 5199, at 173-180, 219-226 (1978 ed.). That is the entire purpose of Rule 402 and other similar provisions in recently revised state evidentiary codes. The point was to wipe the slate clean of judicially-created limitations on the admissibility of relevant evidence and to insist that in the future all relevant evidence should be admitted, subject only to those exceptions required by, or designed to implement, the Constitution, a statute, or a statutorily authorized rule. As the Advisory Committee explained, Rule 402 "constitute[s] the foundation upon which the structure of admission and exclusion rests." The Committee explicitly described the kinds of circumstances in which relevant evidence might be excluded in accordance with Rule 402:

> Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

No mention was made of suppression based solely on a common-law rule developed in the exercise of a court's supervisory power. See 1 J. Weinstein and M. Berger, *Weinstein's Evidence* ¶ 402[01], at 402-8 (1978 ed.) (treating Rule 402's enumeration of the possible grounds for exclusion of relevant evidence as exhaustive).

As transmitted to Congress by this Court, Rule 402 provided (56 F.R.D. at 216):

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

The House Judiciary Committee modified this draft to replace the phrase "other rules adopted by the Supreme Court" with the current version, "other rules prescribed by the Supreme Court pursuant to statutory authority." The Committee explained that the change was made "[t]o accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence * * *." H.R. Rep. No. 93-650, *supra*, at 7. The Committee's remark referred, of course, to the Court's promulgation of the proposed Rules of Evidence in 1972 pursuant to the rulemaking authority conferred by 18 U.S.C. 3771, 3772, and 3402 and 28 U.S.C. 2072 and 2075. See 56 F.R.D. 183, 184 (1972).

By revising the language of the Court's proposed Rule 402, therefore, Congress wished to emphasize that any additions to or modifications of the Rules of Evidence as enacted into law could be made only in accordance with the new procedure established by 28 U.S.C. 2076, enacted as part of the same statute that contained the Rules themselves. 88 Stat. 1948. Unlike the previously existing rules enabling acts, 28 U.S.C. 2076 requires a 180-day "layover" period

between the time proposed amendments to the Rules of Evidence are reported to Congress by the Court and the time the amendments become effective.[10] More important, 28 U.S.C. 2076 is unique among the rules enabling provisions in that it authorizes either House of Congress to defer the effective date of any proposed amendment until a date later than the expiration date of the ordinary layover period or until the amendment is approved by Act of Congress. The statute is further distinguished by its inclusion of a so-called "one-house veto" provision, permitting either House of Congress to block the effectiveness of a proposed amendment by passing a resolution of disapproval. Finally, Section 2076 flatly declares that, in one particular area, *only* a statute can change the existing Rule. The enabling provision states that any proposed amendment "creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress." [10a]

The congressional purpose underlying the enactment of Section 2076 is readily apparent from this description of the procedures prescribed for amend-

[10] Ninety-day layovers are required by 18 U.S.C. 3771 and by 28 U.S.C. 2072 and 2075. No layover provision is included in 18 U.S.C. 3402 or 3772.

[10a] Of course, as we discuss at pages 31-32, *infra*, Fed. R. Evid. 501 explicitly contemplates case-by-case judicial development of rules concerning evidentiary privileges. The relevant sentence in Section 2076, therefore, may be somewhat misleading if read alone. Together, Rule 501 and Section 2076 permit the federal courts to fashion rules of privilege in individual cases but require a statute if any such common-law rule is to be codified as part of the Federal Rules of Evidence.

ing the Federal Rules of Evidence. Congress sought to retain a greater measure of direct control over the rulemaking process than it had provided in earlier rules enabling acts. See H.R. Rep. No. 93-650, *supra*, at 18. And, as we have seen, the House Judiciary Committee revised the Court's proposed version of Rule 402 to stress that future changes in the Rules of Evidence can be accomplished only in accordance with Section 2076 and not by following any of the less rigorous reporting and layover procedures deemed adequate in other areas of judicial rulemaking. In light of Congress' obvious concern that the detailed legislative scrutiny contemplated by Section 2076 not be circumvented or diluted through reliance on some other rules enabling measure, it is inconceivable that Congress could have intended to permit the federal courts, after the effective date of the Rules, to exclude relevant evidence whenever such a course commended itself, viewed as a policy matter of first impression. On the contrary, if Congress thought it necessary to redraft Rule 402 to stress the exclusive applicability of Section 2076 as opposed to other rules enabling statutes (the most important ones of which did, after all, entail some degree of structured legislative supervision),[11] it follows a fortiori that Congress did not expect or want the federal courts to be making changes in or addi-

[11] The enabling acts for the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure both contain 90-day layover provisions designed to permit Congress to review Rules proposed by the Court and to take appropriate legislative action if it finds such proposals unsatisfactory. See 28 U.S.C. 2072; 18 U.S.C. 3771.

tions to the Federal Rules of Evidence on a case-by-case basis, completely outside the scope of the specially devised procedure for congressional monitoring and control.

Although Rule 402 was not the subject of extensive consideration during the congressional floor debates and committee hearings on the Rules of Evidence, the available materials strongly support the view that, at least with respect to matters directly addressed (such as the set of acceptable justifications for the exclusion of relevant evidence), enactment of the Rules precluded future judicial additions or amendments through decisions in individual cases. A colloquy on the floor of the House between Representative Hutchinson and Representative Smith, two of the ranking minority members of the House Judiciary Committee, leaves little doubt of the congressional understanding on this point. See 120 Cong. Rec. 1413-1414 (1974) (because of the length of the exchange, we have reproduced it in the margin).[12] Likewise, testimony

[12] Mr. HUTCHINSON. There is one problem that occurs to me. Since in the past the rules of evidence have evolved and changed over a period of time, I want to inquire as to what the effect of putting them into statutory form will be. Will this effectively freeze them so that there can be no changes in the rules of evidence henceforth except by coming back to Congress and asking Congress to amend the statute?

Mr. SMITH of New York. As I understand the gentleman, the bill provides that the Supreme Court may from time to time recommend to the Congress changes in the rules of evidence or perhaps proposals for rules of evidence in areas which we do not now perceive, and that those new or amended rules of evidence shall become part of the codified rules after 180 days, if I remember correctly, from submission to the Congress, unless they are vetoed by either House within that

before the Senate Judiciary Committee by Judge Albert B. Maris, Chairman of the Standing Committee

time. We have tried to provide for the growth and expansion of the law of evidence but with some check on it so that the Congress can look at it and make a decision.

Mr. HUTCHINSON. I thank the gentleman. Let me put one more question. Will it be possible henceforth for there to be additional rules of evidence, that is, that there will continue to grow within each of the several circuits some additional evidentiary rules which might not be codified and which might not be submitted to the Supreme Court, and there will perhaps be in the future some evidentiary rules which will not be uniform throughout the country because they will grow up differently in the various circuits?

Mr. SMITH of New York. I think the gentleman is correct in that statement and I can foresee, for instance, in areas in which the codified rules of evidence may not cover, that there, as the new question occurs in a court, the judge of that court will make a rule to cover the occurrence and to cover the admission or nonadmission of that evidence in that particular court and that particular case. I suppose to that extent the law of evidence will grow in that way. It will be as it has been in the past, those rules have been subject to review by superior courts and finally will become to be the accepted and uniform rule at least to the extent the Supreme Court makes a final determination for the whole country. Otherwise, there may be some different rules in some different courts in regard to those positions which may not have been covered by the present law.

Mr. HUTCHINSON. But so far as the codification itself is concerned it would not be possible legally for a judge in any court to provide a rule of evidence at variance with this modification. So far as the codification reaches, it will be uniform throughout the country.

Mr. SMITH of New York. I would say to the gentleman that is correct. In many of the rules that we have proposed, the judges have a certain amount of discretion as to whether to allow evidence in or out depending upon the cases as outlined in the codified rule.

It would be my answer that a judge would not be able to hold adversely to the codified rules of evidence and that the

on Rules of Practice and Procedure of the Judicial Conference of the United States throughout the drafting of the Rules of Evidence, recognizes that changes in the Rules are to be made, not through case-by-case adjudication, but through the procedure established in 28 U.S.C. 2076. *Rules of Evidence: Hearings Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 43 (1974). See also *id.* at 82, 100-101, 199. Finally, Professor Richard H. Field, in comments submitted to the House Judiciary Committee, remarked explicitly on the effect of the Committee's revision of the Court's proposed Rule 402. Rather than the phrase "other rules prescribed by the Supreme Court pursuant to statutory authority," Professor Field would have preferred "other rules lawfully prescribed by the Supreme Court." He explained that this alternative would not "foreclose the argument for inherent power" to make rules of evidence on a case-by-case basis. *Rules of Evidence* (*Supplement*): *Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., 269 (1973). Congress took no action in response to Professor Field's suggestion.

None of the foregoing is intended to suggest that the Rules of Evidence, as enacted, are without flexibility. The point, rather, is that the flexibility intended by Congress is the flexibility built into the Rules, and no more. Where the issue is the quality

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only way those could be changed would be through further legislation. In the event that some rule turns out in practice to be one that reasonable people would agree ought to be changed, it would be subject to further legislation for amendment.

of relevant evidence and the extent of its probable contribution to the ascertainment of truth, Congress has provided ample safety valves to ensure that federal district courts retain sufficient discretionary control over the proceedings before them. Fed. R. Evid. 403 expressly authorizes courts to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Conversely, the two so-called "wild card" exceptions to the hearsay rule (Fed. R. Evid. 802) permit courts to admit otherwise inadmissible hearsay statements whenever such statements have "circumstantial guarantees of trustworthiness" equivalent to those reflected in the recognized hearsay exceptions and the court finds that no other reasonably available evidence will be equally probative of the material fact at issue and that the interests of justice will best be served by admission of the hearsay statement. See Fed. R. Evid. 803(24), 804(b)(5). See also S. Rep. No. 93-1277, 93d Cong., 2d Sess. 18-20 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 12-13 (1974).

Even where the inquiry concerns not the quality of relevant evidence but a policy judgment extrinsic to the accuracy of the fact-finding process, Congress has, in one important area, left the development of evidentiary rules to the courts. After extended debate, Congress refused to enact the rules proposed by this Court regarding evidentiary privileges (see 56 F.R.D. at 230-261) and instead provided that questions of privilege in federal cases ordinarily "shall be gov-

erned by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501. This Rule, patterned after the deleted second sentence of former Fed. R. Crim. P. 26 (see page 20, *supra*), was intended "to leave the Federal law of privilege where [Congress] found it" and to avoid the perceived difficulties in the Court's proposal by allow-by-case basis. 120 Cong. Rec. 40,891 (1974) (remarks ing judicial development of privilege rules on a case-of Rep. Hungate, Chairman of the House Judiciary Subcommittee responsible for the Rules of Evidence); H.R. Rep. No. 93-650, *supra*, at 8-9; S. Rep. No. 93-1277, *supra*, at 11; Brief for the United States at 9-10, *Trammel* v. *United States*, No. 78-5705 (argued Oct. 29-30, 1979).

Indeed, Rule 402 itself necessarily contemplates a substantial degree of judicial latitude in deciding whether relevant evidence should be suppressed in particular cases. The Rule stops far short of identifying specifically every set of circumstances in which suppression of relevant evidence is permissible or required. Rather, the drafters left to the courts the numerous difficult and often dispositive questions concerning the propriety of excluding relevant evidence as a method of implementing the Constitution, a federal statute, or a statutorily authorized rule.[13]

[13] The Advisory Committee's Note to Rule 402 (56 F.R.D. at 216-218 (1972)) demonstrates that the drafters expected the courts to decide when the effective enforcement of a particular constitutional provision, statute, or rule requires the suppression of relevant evidence. As examples of the kinds of judicial rulings the drafters intended to permit, the Note cites *Mallory* v. *United States*, 354 U.S. 449 (1957) (implementing Fed. R. Crim. P. 5(a)'s prohibition of "unnecessary delay" between arrest and arraignment by suppressing a confession obtained during such a delay); *Weeks* v. *United States*, 232 U.S. 383 (1914) (implementing the Fourth Amendment by suppressing evidence obtained through an unlawful search and seizure); and *Massiah* v. *United States*, 377 U.S. 201 (1964) (implementing the Sixth Amendment right to counsel by suppressing a confession obtained in the absence of defendant's attorney).

But Congress did resolve one critical point. By enacting Rule 402, it settled that relevant evidence could not be excluded without some constitutional or statutory justification. As to this, Congress intended no flexibility and provided none. The Rule was adopted precisely in order to establish the basic principle that all relevant evidence is admissible, unless there is some ground for suppression in the Constitution, a statute, or a statutorily authorized rule. This is the sense in which the Advisory Committee declared that Rule 402 is "the foundation upon which the structure of admission and exclusion rests." If Rule 402 does not have the meaning attributed to it here, it means nothing at all. If the court of appeals' decision is correct, and federal courts are nonetheless free to exclude relevant evidence whenever they believe it is fitting to do so, then the first sentence of Rule 402 could just as easily read, "All relevant evidence is admissible, unless a court decides otherwise." This could not have been Congress's intent, and the court of appeals accordingly erred in affirming the district court's exercise of supervisory power to suppress re-

spondent's loan guaranty agreement and the related testimony of government witnesses.

II

EVEN IF THE FEDERAL RULES OF EVIDENCE DO NOT RESTRICT JUDICIAL AUTHORITY TO EXCLUDE RELEVANT EVIDENCE, THE COURTS BELOW SHOULD NOT HAVE EXERCISED THEIR SUPERVISORY POWER TO SUPPRESS THE CRITICAL EVIDENCE IN THIS CASE

A. The Supervisory Power Should Not Be Used To Reach Results Inconsistent With This Court's Decisions Under The Fourth Amendment

When the district court invoked its supervisory power to exclude evidence allegedly derived from the seizure of Wolstencroft's briefcase, the court candidly acknowledged (Pet. App. 38a-40a) that, as a matter of Fourth Amendment law, respondent was not entitled to succeed on his motion to suppress. The court stated that respondent "possessed no privacy interest in the Castle Bank documents that were seized from Wolstencroft" (*id.* at 38a) and that he therefore "has no standing under the Fourth Amendment to raise the illegality of the seizure of Wolstencroft's briefcase" (*id.* at 39a). After reviewing the relevant precedents from this Court, the district court correctly concluded (*id.* at 39a-40a n.61) that "only a party whose expectation of privacy has been violated may raise the unconstitutionality of a search and seizure under the Fourth Amendment." The court of appeals, too, proceeded on the assumption that suppression was not warranted under the Fourth

Amendment. Nonetheless, both lower courts held that, because the briefcase search was unlawful, evidence obtained as a result could properly be excluded in respondent's prosecution through an exercise of the supervisory power. This was error.

In its decisions interpreting and applying the Fourth Amendment, this Court has repeatedly observed that the exclusionary rule is a judicially created remedy that should not be extended beyond the areas in which "its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). The rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Ibid.* Instead, the Court has examined the nature and purposes of the exclusionary rule in a variety of factual and procedural contexts and has concluded on several occasions that the potential benefits to be derived from application of the rule are outweighed by the negative impact that the exclusion of relevant (and often highly probative) evidence is likely to have on the ability of courts to ascertain the truth and effectively to enforce the laws. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 564, 485-489 (1976) (claim that exclusionary rule should have been applied to exclude illegally seized evidence in state criminal trial not cognizable in federal collateral attack on resulting conviction, unless defendant was deprived of full and fair opportunity to litigate his claim in state proceeding); *United States* v. *Pel-*

tier, 422 U.S. 531, 535-539 (1975), and cases cited therein (refusing to apply exclusionary rule decisions retroactively); *United States* v. *Calandra*, *supra*, 414 U.S. at 347-352 (grand jury witness may not refuse to answer questions on ground that they are based on illegally seized evidence); *Walder* v. *United States*, 347 U.S. 62 (1954) (evidence obtained in unlawful search may be used to impeach defendant who voluntarily testifies on his own behalf). See also *United States* v. *Ceccolini*, 435 U.S. 268, 275-279 (1978); *United States* v. *Janis*, 428 U.S. 433, 448, 453-454, 457-560 (1976).

For present purposes, the most important manifestations of the Court's effort to set appropriate limits on the applicability of the exclusionary rule are the numerous decisions holding that the rule's deterrent purpose is adequately served if unlawfully obtained evidence is subject to suppression only at the instance of persons who have themselves been victims of the challenged search or seizure. See *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978) ("since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, * * * it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections"); *Brown* v. *United States*, 411 U.S. 223, 229-230 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174 (1969); *Simmons* v. *United States*, 390 U.S. 377, 389 (1968); *Wong Sun* v. *United States*, 371 U.S. 471, 492 (1963); *Jones* v.

United States, 362 U.S. 257, 261 (1960).[14] As the Court explained in *Alderman*, *supra*, 394 U.S. at 174-175,

> [t]he deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

See also *Elkins* v. *United States*, *supra*, 364 U.S. at 216 ("any apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice").

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[14] In *Rakas* v. *Illinois*, *supra*, 439 U.S. at 132-138, this Court rejected the argument that an exclusionary remedy should be available to persons who, like respondent, claim to be "targets" of an illegal seizure but can allege at most a violation of another person's Fourth Amendment rights. The Court observed that permitting the assertion of vicarious Fourth Amendment claims "would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials," a result that would "exact[] a substantial social cost" by keeping relevant and reliable evidence from the trier of fact and deflecting the search for truth in judicial proceedings (*id.* at 137). The Court also emphasized the administrative difficulties that adoption of a "target" rule of standing inevitably would entail (*id.* at 136-137).

The Court's salutary restriction on the category of persons who can avail themselves of an exclusionary remedy should not be abandoned under the rubric of supervisory power. The Fourth Amendment is the constitutional provision that is directly concerned with protecting persons from unreasonable searches and seizures; district courts should not be permitted to employ their supervisory power to redress unlawful searches by providing an exclusionary remedy in circumstances in which this Court has decided that such relief is an inappropriate means of enforcing the very constitutional provision that governs the legality of searches. See *United States* v. *Baskes*, 442 F. Supp. 322, 333-334 (N.D. Ill., 1977), appeal pending, No. 77-2178 (7th Cir.) (refusing to suppress evidence allegedly obtained as a result of the search of Wolstencroft's briefcase because "[t]he application of the supervisory powers doctrine in this case would constitute, in essence, a circumvention of the Fourth Amendment standing requirement"). Accord, *United States* v. *Jones*, 433 F.2d 1176, 1181-1182 (D.C. Cir. 1970), cert. denied, 402 U.S. 950 (1971).

B. The Federal Courts Should Not Invoke Their Supervisory Power As A Means Of Regulating The Investigative Activities Of Executive Branch Officers In Ways Not Grounded In Any Statute, Rule, Or Constitutional Provision

We began the Argument portion of this brief by urging that the supervisory power, properly conceived, is not a separate entity but rather a part of

the general judicial power to decide cases and controversies. If this proposition is correct, it helps clarify the nature of the inquiry to be conducted when litigants invite a court to adopt a procedural or substantive rule not prescribed by the Constitution or Congress. To ask whether the courts' "supervisory power" should be exercised in a particular case is really no different from asking whether the subject matter involved is suitable for judicial regulation on the basis of standards developed, not by one of the political branches or by the Founding Fathers, but by the courts themselves. We submit that the conduct of government officers in investigating possible criminal activity is not an appropriate focus for judicial supervision. When a litigant complains of a law enforcement incident or practice remote from the judicial arena, the courts should refrain from adopting evidentiary rules designed to enforce compliance with behavioral norms not established by the Constitution, a statute, or a rule, but merely thought desirable by the particular court having jurisdiction over the controversy.

To be sure, in the present case we assume that the briefcase search violated Wolstencroft's rights under the Fourth Amendment. But, for the reasons already discussed (see pages 34, 36-37, *supra*), that fact alone does not entitle *respondent* to suppression as a constitutional remedy. Respondent did not suffer any invasion of his Fourth Amendment rights. The exer-

cise of supervisory power by the courts below, therefore, must be based on the assumption that, even where challenged police conduct violates no constitutional or statutory standard, exclusion of relevant evidence is an appropriate response if the court, applying its own personal yardstick, finds the officers' conduct sufficiently objectionable. This assumption is incorrect, because the power of the Judicial Branch does not properly extend to the formulation of unsupported rules identifying impermissible law enforcement measures and specifying sanctions for them. Cf. *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977).

This Court has frequently suppressed relevant evidence obtained in violation of the Constitution or a statute or a statutorily authorized rule. Sometimes the Court has explicitly invoked its "supervisory power" in support of these decisions (see, *e.g.*, *McNabb* v. *United States*, *supra*; *Rea* v. *United States*, *supra*; *Elkins* v. *United States*, *supra*), and sometimes it has not (see, *e.g.*, *Miller* v. *United States*, 357 U.S. 301 (1958); *Mallory* v. *United States*, *supra*; *Nardone* v. *United States*, 308 U.S. 338 (1939); *Nardone* v. *United States*, 302 U.S. 379 (1937); *Weeks* v. *United States*, *supra*), but invariably there has been some textual foundation for the Court's conclusion that the police behavior involved was wrongful. The Court has grappled, in such circumstances, with the question whether exclusion is a suitable remedy for the official misconduct that occurred and, in reaching an answer, has relied on the settled judicial power to fashion appropriate remedies for constitutional and statutory violations. See *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395-397 (1971). But the Court has never, in the absence of standards derived from the Constitution or Congress, asserted any such inherent power to declare the investigative conduct of law enforcement officers unlawful. What one commentator said in 1965 remains true today: "Supervisory power has not yet been invoked to exclude evidence obtained through the use of reprehensible police methods which fall short of illegal conduct." Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. J. 1050, 1067 (1965). See also Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1664 (1963) ("Evidence obtained by police action which can be characterized as unfair but which is not, strictly speaking, illegal has not yet been excluded under the aegis of the supervisory power").

At the same time, this Court and the lower federal courts have not hesitated to formulate rules for the governance of judicial proceedings. See the cases cited at pages 14-16, *supra*. See also *Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977) ("It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy"). This readiness to regulate the conduct of the courtroom, even without explicit statutory or constitutional authorization, is hardly surprising in light of the long-

accepted capacity of the courts to prescribe and adjust their own procedures. At the very beginning of the nation, when the Attorney General asked this Court "for information, relative to the system of practice by which the attorneys and counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained," the Court responded:

> The Court considers the practices of the courts of King's Bench and Chancery in England as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary.

Rule, 2 U.S. (2 Dall.) 414 (1792). See also Hill, *supra*, 69 Colum. L. Rev. at 194 ("In the Anglo-American system, the judiciary has traditionally been deemed to possess competence to adopt measures to regulate and improve the quality of the judicial process").

The disparity between the frequency and willingness with which the courts have exercised control over matters of judicial procedure and their expressed reluctance to pursue "an undesired and undesirable supervisory role over police officers" (*United States* v. *Janis*, *supra*, 428 U.S. at 458) is not difficult to understand. The courts' hesitation to regulate conduct not directly related to the judicial process reflects not mere prudent circumspection but a proper reluctance to interfere with the coequal functions of the Executive and Legislative Branches and a necessary regard for the constitutional separation of powers. A judicial assertion of a broad discretionary power to exclude evidence not obtained in violation of any statute, rule, or constitutional provision would necessarily entail some encroachment on the prerogatives of the Executive Branch in investigating criminal conduct and initiating prosecutions. See Hill, *supra*, 69 Colum. L. Rev. at 202-207. As Professor Hill has written (*id.* at 205; footnote omitted):

> one may readily infer a major judicial role in the formulation of rules promoting the fair and effective operation of the trial, including rules of evidence for determining the guilt or innocence of the accused. But, under the Constitution and the governing statutes, it is, to say the least, less obvious that the judiciary has authority to pass *independent* judgment on the propriety of investigational and enforcement activity of the executive branch. The constitutional prerogatives of the executive branch in this regard are subject to a large measure of control by Congress, but it is not clear that the courts may go beyond the implementation of constitutional and statutory limitations.

The Sixth Circuit echoed this view in a case decided only 15 months before the present one. *United States* v. *Leja*, 563 F.2d 244 (1977), cert. denied, 434 U.S. 1074 (1978).[15] See also *United States* v.

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[15] The court of appeals in *Leja* stated (563 F.2d at 247):

> [T]he traditional area for exercising [supervisory] powers has been within the framework of judicial proceedings. * * * It is quite another matter, however, to extend

Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977).[16]

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the court's supervisory power to areas outside this traditional domain of the court. To do so here, where the government conduct does not offend a personal right of any defendant would be directly "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." * * * A proper respect for the coequal responsibilities of the other branches of government under the Constitution and for the system of checks and balances * * * persuades us to refrain from acting here.

[16] *Chanen* involved alleged prosecutorial misconduct in presenting a case to the grand jury. Defendants moved to dismiss their indictment on the ground that the government improperly read transcripts of previous sworn testimony to the grand jury rather than presenting live witnesses. To the extent that the claim for relief in *Chanen* arose in the grand jury context, the case was similar to *United States* v. *Jacobs*, 547 F.2d 772 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978). In *Jacobs*, the defendant sought to suppress her incriminating testimony before the grand jury on the ground that the prosecutor had improperly departed from the practice of the local United States Attorney's office in failing to give a so-called "target warning" when the defendant appeared as a grand jury witness at a time when she was a subject of the grand jury's investigation.

The questions whether and under what circumstances a court may invoke its supervisory power to regulate the behavior of government officers in the grand jury context are difficult ones, because the grand jury is a hybrid institution. It partakes of both the executive and the judicial power, but at the same time it occupies a constitutionally mandated independent status, free from undue influence by either prosecutors or judges. See *Costello* v. *United States*, 350 U.S. 359, 362 (1956); *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 700-702 (1972); *United States* v. *Calandra*, *supra*, 414 U.S. at 342-344; *United States* v. *Chanen*, *supra*, 549 F.2d at 1312. Although this Court has often referred to the federal district

In the present case, respondent sustained no violation of his Fourth Amendment rights and, accordingly, cannot claim any Fourth Amendment remedy. Notwithstanding the district court's holding that respondent's due process rights would be violated by the introduction against him of evidence derived from

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courts' authority to supervise grand juries sitting within their districts (see, *e.g.*, *Douglas Oil Co.* v. *Petrol Stops Northwest*, No. 77-1547 (Apr. 18, 1979), slip op. 13-14; *United States* v. *Calandra*, *supra*, 414 U.S. at 346 & n.4; *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973); *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 688, 708), the contours of that authority have not been limned and, in any event, the Court's references seem to contemplate supervision by the empanelling court during the grand jury's term rather than supervision through later judicial rulings in connection with the trial of an indictment returned by a grand jury allegedly influenced by government misconduct. In short, the bounds of the federal courts' supervisory power in the grand jury context are uncertain, and, apart from the statutory contentions advanced by the government in *Jacobs* (to the effect that Fed. R. Evid. 402 and 18 U.S.C. 3501 precluded the suppression of the defendant's grand jury testimony), that case was arguably more difficult than this, because the propriety of independent judicial control over grand jury proceedings is substantially more plausible than the propriety of similar control over police investigative activities. Whatever the correct description of the judicial role in regulating the grand jury, however, these words of the Ninth Circuit in *Chanen* (549 F.2d at 1313; footnote omitted) remain instructive:

> Given the constitutionally-based independence of each of the three actors—court, prosecutor and grand jury—we believe a court may not exercise its "supervisory power" in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. If the district courts were not required to meet such a standard, their "supervisory power" could readily prove subversive of the doctrine of separation of power.

the search of Wolstencroft's briefcase (Pet. App. 41a-56a), the court of appeals did not rely on any constitutional ground in affirming the exclusion of the critical evidence. As the case comes to this Court, therefore, the court of appeals has asserted a power to suppress evidence, wholly apart from constitutional or statutory standards, solely because it disapproves of federal law enforcement officers' investigative conduct.[17] By doing so, the court has flouted this Court's injunction that the supervisory power be "sparingly exercised" (*Lopez v. United States*, 373 U.S. 427, 440 (1963)) and has displayed an inadequate regard for the constitutional prerogatives of the Executive Branch in fulfilling its law enforcement responsibilities. Cf. *Keim* v. *United States*, 177 U.S. 290, 293 (1900), quoted in *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974) (courts have no general supervising power over Executive Branch appointments to official government positions). The result reached below is flatly inconsistent with this Court's conclusion in

[17] There is no suggestion in the opinion of either the district court or the court of appeals that the methods used here to secure the information contained in Wolstencroft's briefcase are commonly practiced by government agents in criminal cases. In an attempt to avoid similar misconduct in the future, the IRS has instituted guidelines restricting the use of informants by its agents. IRS Manual Supp. 9G-40 (Feb. 3, 1977). These guidelines require IRS agents affirmatively to instruct informants not to violate the law or any person's constitutional rights. *Id.* at § 3.03. Furthermore, the guidelines require agents to report an informant's violations of local law, discovered by agents in the course of an investigation, to appropriate state agencies for criminal prosecution. *Id.* at § 4.

Lopez, supra, 373 U.S. at 440, a conclusion that fittingly summarizes the government's position in this case:

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

C. The Court Of Appeals' Exercise Of Its Supervisory Power Was Improper Because It Failed To Provide Meaningful Standards For The District Court To Apply

The court of appeals' approval of the district court's use of its supervisory power in this case is especially troublesome because the court provided no effective supervision for future cases. The district court's initial opinion suggests (Pet. App. 58a-61a; footnotes omitted) that federal courts should exercise their supervisory power to exclude evidence whenever it is obtained "by Governmental conduct which is either purposefully illegal or motivated by an intentional bad faith hostility to a constitutional right." The court of appeals offered no hint whether it accepted this broad view or whether it only endorsed the district court's decision to exclude the challenged evidence in this case. If the latter reading of the court's opinion is correct, then district courts in the Sixth

Circuit have been given no guidance whatever regarding the circumstances in which suppression is appropriate.[18] Exclusion of the relevant evidence of respondent's criminal activity would thus penalize society by "deflect[ing] the truthfinding process and * * * free[ing] the guilty" (*Stone* v. *Powell*, *supra*, 428 U.S. at 490) without accomplishing the sole articulated purpose for the exercise of a court's supervisory power. Cf. *Gertz* v. *Robert Welch, Inc.*,

[18] The court of appeals completely ignored the government's contention that the loan guaranty agreement and other relevant evidence were not tainted by the January 1973 search. See Brief for the Appellant 50-62. (The government argued that the grand jury inquiry into the possible improper use of foreign bank accounts by United States taxpayers was a natural outgrowth of the nine-year-old IRS investigation and would have been conducted regardless of the briefcase search. The government also maintained that issuance of subpoenas to the Bank of Perrine was an entirely predictable action by the grand jury, in view of the Bank of Perrine's correspondent relationship with Castle Bank and its role in helping a suspected narcotics dealer establish an account there (see note 3, *supra*), both of which were known to Agent Jaffe before January 1973.) Because the court of appeals did not address this contention, it is impossible to determine whether the court agreed with the district court's conclusion that the government failed to establish that the loan guaranty was discovered independently of the briefcase search or whether the court of appeals simply believed that the question of taint was irrelevant to the propriety of the district court's exercise of its supervisory power. By omitting all discussion of the connection between the challenged evidence and the illegal search, the court of appeals contributed further to the impression that it has asserted an essentially limitless power to exclude evidence whenever it disapproves of law enforcement practices, regardless of the relationship between those practices and a particular criminal proceeding.

418 U.S. 323, 343-344 (1974) (in the law of defamation, striking appropriate balance between rights of press and individual on case-by-case basis "would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application"). If, on the other hand, the former reading of the court of appeals' opinion is correct, then the court has decided that evidence obtained from a deliberate Fourth Amendment violation can never be used by the government, even against someone whose rights were not violated by the illegal search. Such a far-reaching rule would render meaningless an important aspect of this Court's decisions under the Fourth Amendment, and certainly should not be adopted sub silentio by a court of appeals.

The court of appeals' failure to articulate standards for the application of the supervisory power can be expected to produce widely divergent results among trial judges in the Sixth Circuit. Any "didactic" value that an exercise of the supervisory power should have (see *United States* v. *Jacobs*, *supra*, 547 F.2d at 778) is completely missing here because of the uncertain import of the court of appeals' decision. In light of the serious questions a broad application of the supervisory power may raise concerning the constitutional separation of powers, clear explication of governing principles is necessary to ensure that

lower courts do not exceed the limits of their power. The court of appeals failed to appreciate this constraint and instead invoked its supervisory power as nothing more than a label, a judicial device for imposing sanctions where none would otherwise be appropriate. This is a development that has, in our view, been prohibited by Congress in Fed. R. Evid. 402 (see point I, *supra*), and that should, in any event, not be permitted to continue unchecked.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

October Term, 1979
No. 78-1729

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK PAYNER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

October Term, 1979
No. 78-1729

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACK PAYNER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. Whether the District Court properly exercised its Supervisory Power in excluding all evidence obtained as a result of the willful, intentional and outrageous criminal conduct by Government agents.

2. Whether a District Court may suppress under the Due Process Clause of the Fifth Amendment, evidence obtained through the commission of bad faith, willful and knowing criminal acts by Government agents, when the illegal conduct was outrageous and suppression is necessary in order to deter repetition of the criminal conduct.

3. Whether a depositor in a bank chartered in a nation whose laws guarantee the confidentiality of bank records has a reasonable expectation of privacy for those records so as to permit him under the Fourth Amendment to object to the introduction of evidence obtained as a result of the "bad faith", willful and knowing criminal theft of those records by Government agents.

STATEMENT

Respondent accepts the Government's statement of the case with the following additions and corrections:

The involvement of Special Agent Richard Jaffe, of the Internal Revenue Service (hereinafter "IRS"), in the theft of the briefcase, admitted in the Government's Brief, went far beyond the mere authorization and approval of the theft. Jaffe was so involved in the planning of the theft that he provided the locksmith used by Norman Casper to unlock the briefcase so the documents contained therein could be photographed (Petitioner's Appendix F, p. 23a, Tr. 96 and 111). Further, in response to Jaffe's request for additional information, Casper instructed Sybol Kennedy to arrange another "visit" with Michael Wolstencroft, and, while she was in his office, to steal his rolodex file from his desk. This she did (A. 35, Petitioner's Appendix F, p. 24a, Tr. 117-119, 126-129, 160-161).

When Operation Trade Winds first commenced with the use of over 30 informants in 1965 until April or May, 1974, the Government issued no subpoenas, search warrants or administrative IRS summons. This, in spite of the fact that in June, 1972 IRS suspected that Castle Bank in the Bahamas functioned as an illegal tax haven for American taxpayers and that it had an account with the Bank of Perrine in Florida.

However, a little over a year after the "briefcase caper", as it was labeled by the IRS (A. 318), and after a complete analysis of the documents found in the briefcase, a Federal Grand Jury in Florida issued subpoenas for witnesses and documents. As a result, a loan guaranty was produced by the Bank of Perrine allegedly executed by Respondent Payner and dated April 25, 1972 (A. 166). The Government concedes that this guaranty was the key to its case (Petitioner's Brief p. 3). All documents that were introduced, except for Payner's tax returns, were discovered as a direct result of the IRS's planned theft of the subject briefcase in January, 1973. As a further result of said theft, Sam Pierson, former officer of the Perrine Bank, and all other key Government witnesses were called to testify.

The record indicates that Special Agent Richard Jaffe submitted a report on Project Haven to a committee of the United States Congress, in which he referred to the "briefcase caper", stating:

> "The information obtained from the informant was extremely valuable and was unavailable from any other source. It [the information from the briefcase] provided the leads as to where to serve the grand jury subpoenas." (A. 243).

In granting the suppression motion, the District Court found that the Government had not met its burden of showing that the suppressed evidence was not the fruit of its criminal conduct, which conduct the Court labeled as ". . . both purposefully illegal and an intentional, bad faith act of hostility . . .". (Petitioner's Appendix F, p. 62a). The Court said:

> "Viewing Richard Jaffe's testimony as a whole, including his demeanor while presenting his testimony, . . .

[that testimony] . . . was *unconvincing.*" (Petitioner's Appendix F, p. 30a). (Emphasis in original).

The District Court specifically found that:

". . . it was not coincidence that the Perrine Bank was served with subpoenas shortly after information in the briefcase had been examined and discussed throughout the I.R.S. districts in the United States." (*Id.* at p. 31a).

Consequently, the District Court concluded:

"The Court finds that the briefcase seized on January 15, 1973 provided the leads which resulted in the issuance of subpoenas to the Bank of Perrine in April and May, 1974. Further the Court finds that Exhibit 4 [the loan guaranty] is a product of the seizure of January 15, 1973, and that the subsequent investigation and indictment of Jack Payner stemmed from the January 15, 1973 seizure." (*Id.* at p. 32a).

The District Court based its suppression order upon the fact that, because the Government's agents obtained the subject evidence through purposeful and knowing criminal conduct, perpetrated in bad faith hostility to constitutional rights, the use of such evidence at trial violated Respondent's Due Process rights under the Fifth Amendment to the United States Constitution. The Court further held that it had a duty to suppress the subject evidence under its inherent Supervisory Powers. From this Order the Government appealed, and the appeal was dismissed on March 17, 1978 for lack of jurisdiction. *United States v. Payner,* 572 F.2d 144 (6th Cir., 1978).

In the Government's second appeal, the Circuit Court of Appeals affirmed the Order of the District Court, based

upon a finding that the District Court had properly exercised its Supervisory Powers, and stated that it had not been necessary to reach the Constitutional questions raised, i.e. the Fourth Amendment search and seizure and the Fifth Amendment Due Process issues. While not discussing the issue, the Circuit Court affirmed the District Court's finding that the suppressed evidence had been tainted. The District Court's finding had been based upon testimonial evidence and the Government's failure to introduce any evidence to meet its burden of proving an independent source or lack of taint (A. 58, Petitioner's Appendix F, pp. 63a-64a).

SUMMARY OF ARGUMENT

The Court is presented with the issue of whether evidence obtained through the "bad faith", willful and knowing criminal acts of Government agents may be suppressed by a District Court. Respondent contends that the District Court correctly suppressed all evidence obtained as a result of the theft, and was authorized to do so under (1) its traditional, inherent Supervisory Powers; (2) the Due Process Clause of the Fifth Amendment; and/or (3) the Fourth Amendment.

The theft of the subject briefcase by paid Government agents constituted crimes under the statutes of the State of Florida, including that of larceny. A Federal Court has the inherent power to supervise the conduct of the Government in trials before it. Not to have exercised that power in the instant case and, thereby, not to have suppressed the subject evidence would have permitted the violation of the basic integrity of the Federal judicial system. *McNabb v. United States,* 318 U.S. 332 (1943). While Courts sparingly

exercise their inherent Supervisory Powers to suppress evidence, *Lopez v. United States,* 373 U.S. 427, *reh. den.,* 375 U.S. 870 (1963), where Federal agents purposefully commit crimes to obtain evidence for criminal prosecutions, that power can and should be exercised to suppress all fruits of such bad faith criminal acts. This Court and other Courts have from time to time refused to suppress evidence obtained through reprehensible police conduct, however the refusals to suppress were based upon findings that the police conduct fell short of being in bad faith and knowingly illegal. In this case, the Government officers planned the "briefcase caper", knowing it to be criminal with total disregard for the standards of conduct and decency that have been traditional in the American concept of justice. They should not be permitted to reap the benefits of their planned criminal acts.

The Government's argument that the adoption by Congress of Rule 402 of the Federal Rules of Evidence strips from Federal Courts their traditional power to safeguard the standards of justice administered within their courtrooms, has no basis in any of the legislative history of the Federal Rules or elsewhere. Had the District Court been unable to suppress the fruits of the criminal acts of Government agents, it would have been forced to be an accomplice in the Government's scheme. In view of all of the circumstances (which were in essence undisputed), the District Court found the conduct of the Government agents to be so "outrageous" as to require the exercise of its Supervisory Powers to suppress all evidence obtained through their criminal conduct.

While the Circuit Court did not find it necessary to reach the issue, the District Court also properly suppressed all evidence obtained through the criminal acts of Government agents under the Due Process Clause of the Fifth

Amendment of the United States Constitution. Even under the Government's strained and unfounded interpretation of Rule 402 of the Federal Rules of Evidence, Federal Courts unquestionably retain the power to suppress evidence obtained in violation of Constitutional safeguards. The standard for determination as to whether Due Process was violated was that set forth in *Rochin v. California,* 342 U.S. 165, 169 (1952), i.e. whether the bad faith, willful and knowing illegal acts of the Government agents in plotting and executing the "briefcase caper" offended ". . . those canons of decency and fairness which express the notion of justice of English-speaking peoples . . ."

The District Court, having properly found that the use of evidence so obtained violated Due Process standards, correctly applied the balancing test of *United States v. Janis,* 428 U.S. 433 (1976), *reh. den.,* 429 U.S. 874 (1977), and determined that society's interest was far better served by suppressing the fruits of the "briefcase caper" and deterring future "outrageous" conduct on the part of Government than would be served by the admission of such evidence at trial. Without the deterrent of the Exclusionary Rule, Government agents would be free randomly and openly to commit crimes against persons, whom the Government had no intention of prosecuting, in order to obtain evidence against other persons. The Government could then claim, as it is now claiming, that it could use such evidence at trial, and the defendants would have no standing to object. Allowing the Government to benefit from its own intentional illegal activity, fails to meet even the minimum standards of Due Process.

Based upon the recent decision of this Court in *Rakas v. Illinois,* 439 U.S. 128 (1978), an individual may not object to evidence obtained through an illegal search and seizure, unless he had a legitimate expectation of privacy.

However, that expectation of privacy need not be based on a property interest. Since the records of the Castle Bank and Trust Company of the Bahamas, which were stolen by Government agents were confidential under Bahamian law, a depositor in that bank had a legitimate expectation of privacy. The theft of those records by agents of the United States Government directly violated that legitimate expectation of privacy. Accordingly, Respondent, who is accused of having such an account, the alleged existence of which was discovered as a result of criminal acts by Government agents, had his Fourth Amendment rights violated.

Therefore, the District Court possessed adequate authority under its Supervisory Powers, the Due Process Clause of the Fifth Amendment as well as the Fourth Amendment, to suppress the fruits of the illegal acts of Government agents.

ARGUMENT

I. UNDER ITS HISTORIC SUPERVISORY POWERS, CONSISTENT WITH THE RULINGS OF THIS COURT, THE DISTRICT COURT PROPERLY EXCLUDED ALL EVIDENCE OBTAINED AS A RESULT OF THE WILLFUL, INTENTIONAL AND OUTRAGEOUS ILLEGAL CONDUCT ON THE PART OF THE GOVERNMENT AGENTS.

The Government is faced with the task of attempting to create a basis for the admissibility of its evidence which was the fruit of admitted bad faith criminal acts of its agents. Rather than affirmatively asserting some basis for the admission of such evidence, the Government argues that Rule 402 of the Federal Rules of Evidence stripped the Federal Judiciary of its traditional Supervisory Powers to protect judicial integrity and maintain civilized standards in the administration of justice. By offering the fruits of its criminal conduct as evidence, the Government attempted to make the District Court a participant in its criminal activities. Not surprisingly, neither the District Court nor the Court of Appeals would participate in such a perversion of the Judicial System.

The Government predicates its arguments on the assertion that none of Respondent's Constitutional rights were violated by the use of the evidence obtained through a purposeful burglary. This is clearly untrue. The District Court, relying on a long line of authority from this Court (as discussed *infra*), held that Respondent's Due Process rights under the Fifth Amendment were indeed violated both by the criminal conduct of Government

Agents in obtaining the suppressed evidence and also in the use of such evidence at the trial. While the Government also asserts in its Brief that the subject evidence was not tainted, that matter was resolved by the District Court based upon the Government's failure to meet its burden of proof to show lack of taint.[1]

A. The Government's Conduct in Perpetrating the "Briefcase Caper" Was Clearly Illegal.

As the District Court set forth in Footnote 66 of its Opinion below (A. 50, Petitioner's Appendix F, p. 48a),

1. The Government again claims what it failed to prove in the District Court, i.e. that the loan guarantee and other evidence was not tainted. Once the fact of an illegal search and seizure or other illegal action by the authorities has been proven, the Government has the burden of showing that its evidence was not tainted by the illegal search. *Alderman v. United States,* 394 U.S. 165 (1969).

It may do so in two ways: (1) by proving that the evidence was obtained independently of the illegal search, *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Nardone v. United States,* 308 U.S. 338 (1939); *Alderman v. United States, supra;* or (2) by demonstrating that the information which led to the discovery of the evidence was so far removed from the illegally seized evidence that the connection became, ". . . so attenuated as to dissipate the taint." *Nardone v. United States, supra* at 341; *Wong Sun v. United States,* 371 U.S. 471 (1963); *Brown v. Illinois,* 422 U.S. 590 (1975). The District Court found, based upon the evidence and the demeanor of the witnesses, that the Government had failed to meet its burden. In particular, the District Court found that the testimony of Special Agent Jaffe was "unconvincing".

Although the Government still contends that the suppressed evidence was not tainted, the Government has already stipulated that such evidence was tainted in another case stemming from the same "investigation", *United States v. Baskes* (No. 77 CR 238, N.D. Ill.), in which it used information from the "briefcase caper" to obtain its evidence and indictment. Paragraph 26 of the Stipulation stated:

> "While the government already knew Castle Bank and Trust had accounts at the American National Bank and the Bank of Perrine, the impetus for these grand jury subpoenae stemmed from the information received from the briefcase."

the actions of the Government operatives[2] in obtaining confidential bank records from the briefcase of Wolstencroft satisfy the elements of a *prima facie* case of criminal larceny under Florida law, Fla. Stat. Ann. §§812.011, 812.021(1)(a) Fla. Stat. Ann. and 812.021(5) Fla. Stat. Ann. and Special Agent Jaffe himself was guilty as a "principal". Fla. Stat. Ann. §777.011.

The District Court further noted that:

> "The type of conduct which the government agents exhibited in connection with the 'briefcase caper' was so outrageous and improper that it probably satisfies the elements of F.S.A. Section 812.081 criminalizing the unauthorized appropriation of trade secrets, such as secret 'lists of customers' by copying such list without permission of the owner. See Section 812.081 (1)(c), (3)." (A. 50, n.66, Petitioner's Appendix F, p. 48a).

That section carries a different penalty from that of larceny and is an independent crime.

B. A Federal District Court Has Inherent Supervisory Powers to Refuse to Accept Evidence Which Is the Fruit of Bad Faith Criminal Conduct by Government Agents.

In considering this case, it must not be forgotten that this is not an instance of a mere good faith technical procedural violation. Rather, the suppressed evidence was the fruit of carefully planned and intentional criminal conduct by Government agents, the admitted purpose of which was to acquire evidence to use against persons such

2. Casper's actions were for the benefit of the IRS and he was hired by and was paid $8,000.00 for his efforts by Jaffe, an employee of the IRS (A. 317).

as the Respondent, under the belief that such persons would not have standing to object to the criminal conduct. This case presents nothing new to this Court, as it is merely an example of a Federal Court's exercising its duty to exclude evidence which the Government obtained in a manner inconsistent with the American standard of justice. If there is anything novel in this case, it is the extent and scope of the Government's illegal conduct. For the Court not to have exercised that power would have permitted the violation of the basic integrity of the Federal system of justice. In *McNabb v. United States, supra* at 339-340, the Court stated:

> "It is true, as the petitioners assert, that a conviction in the Federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand."
>
> * * * * *
>
> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The Trial Court properly determined that the conduct of the Government in the "briefcase caper" was ". . . purposefully illegal and an intentional bad faith act of hostility . . ." (A. 57, Petitioner's Appendix F, p. 62a). The Government agents intentionally violated the law, because they believed that the intended targets of their illegal conduct would have no redress, since such persons would

lack standing to claim any Fourth Amendment violation.[3] That is precisely the position now asserted by the Government. The result of that belief, the illegal conduct, stands as the best evidence of the fallacy of that position.

It has been a long-recognized duty of Federal Judges to take whatever action is necessary, including the imposition of the Exclusionary Rule, to prevent the Federal Courts from being demeaned, through their use as a forum, to sanction lawlessness on the part of law enforcement officers. The exclusion of the evidence in question was the least that could be done to maintain the integrity of the judicial process.[4] The best reason for asserting traditional Supervisory Powers asserted by this Court in *Mapp v. Ohio,* 367 U.S. 643, at 659 (1961) is that:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

The need to exclude evidence resulting from Government illegality was recognized recently by this Court in *Dunaway v. New York,* 47 U.S.L.W. 4635, 4640 (June 5, 1979) both for deterrent and integrity reasons: ". . . not only is exclusion of the evidence more likely to deter police mis-

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3. This is exactly the type of conduct that Mr. Justice White, joined by Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Stevens, in their dissent in *Rakas v. Illinois, supra,* feared might result in Fourth Amendment cases from a rigid and narrow application of standing requirements to automobile search cases.

4. The Government has specifically stated in prior Briefs and implies in its current Brief that while it asserts that Rule 402 deprives a Federal Court of its Supervisory Power to suppress evidence, the Federal Courts retain their Supervisory Powers to dismiss indictments. What the Government has argued is that, in effect, the Courts may use a meat cleaver approach and dismiss indictments to protect the dignity of the Courts and to deter improper or illegal government conduct, but may not use the much more limited remedy of the scalpel to suppress and surgically remove the offensive evidence. That position makes no legal sense.

conduct in the future, but use of the evidence is more likely to compromise the integrity of the courts."[5]

The recent decision of *United States v. Valencia,* 541 F.2d 618 (6th Cir., 1976), exemplified the duty of a Federal Court to protect the integrity of the Federal judicial system by excluding evidence obtained in a manner which would taint that system.

In *Valencia,* a secretary to an attorney who was representing co-defendants of the movant passed confidential memoranda and other information to Federal officers. The Sixth Circuit held that any evidence which was the fruit of such grossly improper conduct, in violation of the attorney-client privilege, and which resulted in prejudice to the defendants, must be excluded under the Court's Supervisory Power. In *Valencia,* all fruits of such conduct were held to be inadmissible, *even though the attorney-client privilege which was violated was not the privilege of the parties seeking suppression.* The Court properly disregarded the fact that the privilege violated was not personal to the movants and remanded the case to the District Court to determine, specifically, which evidence was the fruit of the Government's improper conduct.

The case at bar presents an even stronger case for suppression than did *Valencia.* In *Valencia,* the only improper conduct by Government officials, outrageous as it was, was to induce a secretary to breach her employer's attorney-client privilege. In the case at Bar, Federal agents actually conspired to and did commit numerous crimes in

5. See also, *Brown v. Illinois, supra; Ker v. California,* 374 U.S. 23 (1963); *Lopez v. United States, supra; Elkins v. United States,* 364 U.S. 206 (1960); *Benanti v. United States,* 355 U.S. 96 (1957); *Mallory v. United States,* 354 U.S. 449 (1957); *Communist Party v. Subversive Activities Con. Bd.,* 351 U.S. 115 (1956); *Mesarosh v. United States,* 352 U.S. 1 (1956); *Nardone v. United States, supra.*

utter disregard of State and Federal law, knowing such conduct to be illegal, but with the misguided belief that the evidence that they obtained would not be subject to challenge. The instant case presents, in fact, the ultimate case, save and except possibly for evidence obtained as a result of a planned murder by Government agents.

C. Rule 402 of the Federal Rules of Evidence Does Not Strip the Federal Judiciary of Its Inherent Supervisory Powers.

Rather than affirmatively attempting to justify the admission of the fruits of the theft, the Government devotes the major portion of its Brief to an argument asserting that as a result of the enactment of the Federal Rules of Evidence and in particular Rule 402, the District Court lost its traditional Supervisory Power to suppress such evidence. Rule 402 provides:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

The Government asserts that Rule 402 lists the only instances where a District Court may suppress evidence, and therefore, the Trial Court should not have suppressed the fruits of the theft under its Supervisory Powers.

The legislative history of Rule 402 lends no support to the Government's theory. As originally proposed by the Supreme Court, Rule 402 provided:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States,

by act of Congress, by these rules, or by other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible."

Congress amended the Rule to its current form by replacing "adopted by the Supreme Court" with "prescribed by the Supreme Court pursuant to statutory authority". The amendment was made "[t]o accommodate the view that Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence." Report of the Committee on the Judiciary, 93 Cong., 1st Sess., Report No. 93-650 (Nov. 15, 1973) p. 7.

The testimony of Professor Richard H. Field was cited by the Government in their Brief at p. 30 in support of the position that Rule 402 eliminated the Supervisory Power to suppress evidence. However, a full reading of that testimony demonstrates that the traditional Supervisory Power of a Court to suppress evidence on a case by case basis was assumed to be unchanged by Rule 402:

> "*Rule 402.* I approve the principle which led the Subcommittee to change 'adopted' to 'prescribed' by the Supreme Court pursuant to statutory authority. The Subcommittee wishes neither to acquiesce in nor negate the authority of the Court to promulgate Rules of Evidence. This desired neutrality would, I think, be better achieved if the words were 'lawfully prescribed by the Supreme Court.' It is at least arguable that *since the Court has inherent power as part of the judicial power to make rules of evidence on a case-by-case basis,* it has the power to establish generally applicable rules of evidence, so long as they do not conflict with a statute and subject always to being altered or voided by an Act of Congress. The Advisory Committee and the Judicial Conference relied upon the Enabling Act, 28 U.S.C. § 2072, as authority for promulgating rules of evidence, and all the justices of the Supreme Court except Justice Douglas agreed with this approach, but I see no useful purpose in trying to foreclose the argument for inherent power." Hearings before the Special Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Reps., 93rd Cong., 1st Sess., on Proposed Rules of Evidence, Serial No. 2, p. 269 (Supp. 1973). (Emphasis supplied).

Clearly, the purpose of the change in the rule did not relate to the Supreme Court's or a lower Court's inherent power to refuse to accept evidence on a case by case basis when necessary to protect the integrity of the Court. What Congress was attempting to do was maintain the status quo and prevent an interpretation of Rule 402 which would permit the Supreme Court to adopt a new statutory rule of evidence or procedure without following the procedure of the Enabling Acts. Consequently, Congress amended Rule 402 to maintain the existing Enabling Acts' procedure, so that the Supreme Court could not amend an existing statutory rule of criminal procedure or evidence without that amendment first being approved, ratified or at least reviewed by Congress pursuant to current authority.

The Government's Brief fails to recognize that the District Court did not prescribe a general rule of evidence, but rather suppressed evidence in a specific case as the evidence had been obtained by the Government knowingly and purposefully with bad faith hostility towards the strictures imposed on their activities by the Constitution. The policies which dictate exclusion have very different objectives from the administrative policies underlying the prescription of general rules of evidence. Professor Weinstein correctly points out that "Rule 402 makes no attempt

to enunciate the underlying policies which dictate exclusion." WEINSTEIN'S EVIDENCE, §402[01], p. 402-8 (1978). However, one function of exclusionary rules ". . . limits admissibility in order to implement some extrinsic policy which the law considers more important than ascertaining the truth in a particular lawsuit." *Id.* Under that function, ". . . relevant evidence may be excluded to strengthen the judicial system." *Id.* at p. 402-12.

The argument that Rule 402 eliminates the Supervisory Power to suppress evidence was made by the Government previously and was strongly rejected. *United States v. Jacobs,* 547 F.2d 772, 777 (2d Cir., 1976), *cert. dismissed as improvidently granted,* 436 U.S. 31 (1978). The issue discussed was the admissibility of particular statements made to a grand jury. The Second Circuit stated:

> ". . . the Government takes the extreme position that by Rule 402 of the Federal Rules of Evidence (a Congressional enactment) relevant evidence is to be excluded solely in those cases where exclusion is required 'by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court, pursuant to statutory authority.' It offers no history to support the view that Congress was concerning itself with the supervisory powers of the federal courts. The obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent."

The Second Circuit clearly and properly interpreted Rule 402 as providing no basis to strip from the Federal Judiciary its historic power to supervise the Federal Judicial process by excluding evidence obtained in a manner that a Federal Court deems to be so grossly improper as to be a threat to the integrity of the entire Federal Judicial System. The Government goes to great lengths to cite

case precedent for the right of Congress to prescribe Rules of Evidence and legislative history of the Rules to demonstrate the intent of Congress to abrogate, in most instances, common law rules of evidence and establish uniformity among the federal courts. The Government, however, failed to cite any case or legislative history in support of its interpretation of Rule 402. So far as Respondent is aware, there is no case or legislative history to support the Government's proposition that the judiciary has been deprived of its traditional Supervisory Powers to prevent the use of the Federal Courts as a forum for evidence obtained through willful and bad faith criminal conduct.

Numerous courts have suppressed evidence, reversed convictions, remanded for sentencing or taken other action premised on the Court's Supervisory Powers. See e.g., *Elkins v. United States, supra* (suppression of evidence); *Yates v. United States,* 356 U.S. 363 (1958) (sentencing); *Mallory v. United States, supra* (suppression of evidence); *McNabb v. United States, supra* (suppression of evidence). This Court has even recognized its own Supervisory Powers and dismissed an indictment noting that the defendant need not have shown any prejudice because according to the Court, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States,* 329 U.S. 187, 195 (1946).

To accept the Government's position on Federal Rule 402 would implicitly overrule *Mallory* and *Elkins* and strip from the Federal Judiciary one of the most important of the Checks and Balances in our federal system. The Government's position would require the Courts to sanction the criminal conduct of Government agents, and permit the Government to benefit from its illegal behavior. To do so would be tantamount to requiring the Federal

Judiciary to actively participate in the bad faith criminal conduct of the Government and its agents. It is inconceivable that Congress would have eliminated a traditional and necessary power of the Federal Courts without some comment, let alone without a careful discussion and analysis.

The Government neither claims "good faith" nor denies that the acts of its agents were not only illegal, but purposefully and knowingly criminal. Rather than attempt to justify its activities, the Government asserts that there is no remedy available to the Respondent. It is precisely to prevent the growth and development of this callous and lawless attitude on the part of our Government that Courts exercise their Supervisory Powers.

D. The Bad Faith Commission of Crimes by Government Agents Is So Egregious As to Require a District Court to Exercise Its Supervisory Powers.

The Government in its Brief attempts to persuade this Court that there can be no excesses committed by federal agents justifying a District Court's use of its Supervisory Powers. None of the authorities relied upon by the Government, however, contained facts which remotely resembled the facts in the instant case. None of the cases cited and relied on by the Government involved the Government's willingness to circumvent constitutional safeguards coupled with a purposeful, intentional violation of criminal statutes as was so evident in the instant case.

In *Lopez v. United States, supra,* this Court did state, as the Government cites in its Brief, that:

> ". . . the Court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised." *Id.* at 440.

However, in the very next sentence, this Court went on to state:

> "Its application in the present case, *where there has been no manifestly improper conduct by federal officials,* would be wholly unwarranted." *Id.* (Emphasis added).

In the instant case, the District Court, following the criteria of *Lopez,* and based upon the evidence before it, made a specific finding that the actions of the federal agents were not merely "manifestly improper", but were "outrageous" and knowingly "illegal,"[6] unlike *Lopez* where there was ". . . no act of any kind which could justify the creation of an exclusionary rule."

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6. The District Court also found that:

". . . the Government's action in this case was both purposefully illegal and an intentional, bad faith act of hostility . . ." (A. 57, Petitioner's Appendix F, p. 62a).

. . . .

". . . the United States . . . knowingly and willfully participated in the *unlawful* seizure . . . (A. 36, Petitioner's Appendix F, p. 25a). (Emphasis added).

. . . .

". . . the United States was an active participant in the admittedly criminal conduct . . ." (A. 37, Petitioner's Appendix F, p. 26a).

. . . .

". . . the illegal conduct of the government officials involved in this case compels the conclusion that they knowingly and purposefully obtained the briefcase materials with *bad faith hostility* toward the strictures imposed on their activities by the Constitution. (A. 50, Petitioner's Appendix F, p. 48a). (Emphasis in original).

. . . .

"The Activities of the Government agents [were] . . . outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all like-minded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country . . . (A. 51, Petitioner's Appendix F, p. 50a).

. . . .

"The need to deter gross illegal activity on the part of the Government, such as occurred in this case, is clear." *Id.*

In *United States v. Leja,* 563 F.2d 244 (6th Cir., 1977), relied upon by the Government in its Brief, the Sixth Circuit Court of Appeals held that *where no precise violation of any penal statute by officers in question was shown* (unlike the instant case where federal officers and agents specifically and intentionally violated Florida criminal statutes), even though defendants could not have obtained sources of supply and information without the assistance of Government agents, given their established predisposition to go into the drug-making business, governmental participation in the manufacture of Phencyclidin did not offend concepts of fairness as to justify the extraordinary employment of judicial power to curb it.

On appeal, defendants contended that the Government's involvement in the entire illicit operation was so excessive as to violate Due Process as a matter of law or to warrant reversal under the supervisory jurisdiction over the judicial system. The defendants relied on the view of five justices in *Hampton v. United States,* 425 U.S. 484 (1976) who had indicated that overinvolvement of Government agents in criminal offenses might be so egregious as to violate Due Process and to warrant reversal under the Court's supervisory powers. Mr. Justice Rehnquist, however, speaking for a plurality in *Hampton,* stated that Due Process would not be offended by such conduct and it would never be appropriate to use Supervisory Powers *in such situations.*

Mr. Justice Powell and Mr. Justice Blackmun concurred in the judgment but declined to join in a *per se* rule. They foresaw the issue of this case, and used the term "outrageous police conduct" to describe instances where a District Court should exercise its Supervisory Powers. In Footnote 6, of his concurring Opinion, Mr. Justice Powell observed that an analysis of the appropriate use

of Supervisory Powers is like an analysis under the Due Process Clause, where the test is fundamental fairness under the circumstances. *Rochin v. California, supra.* Actually, the instant case provides a more compelling case for the exercise of Supervisory Powers than that foreseen by Mr. Justice Powell in *Hampton.* Here the Government agents were the planners and sole perpetrators of the criminal acts, rather than engaging in ". . . illegal activity in concert with a defendant . . ." *Hampton v. United States, supra* at 490.

In light of *Hampton,* the Sixth Circuit Court of Appeals in *Leja* did not believe that the Government activity so offended its concept of fundamental fairness as to justify the extraordinary employment of judicial power to curb it. Therefore, the conviction was affirmed. The Sixth Circuit Court, however, while acknowledging that the traditional area for exercising Supervisory Powers has been within the framework of judicial proceedings, stated:

> "Like Judge Friendly in *United States v. Archer* [486 F.2d 670 (2nd Cir., 1973)], and like Justice Powell in *Hampton,* supra, we determine never to say 'never' as long as the potential for abuse of individual rights exists in governmental action." 563 F.2d at 247.

Judge Rubin, in his dissenting opinion in *Leja,* stated:

> "It is clear from the concurrence and majority opinions in *Hampton v. United States,* that a majority of the United States Supreme Court recognized that there may be a level of egregious governmental participation in criminal activity that is proscribed, no matter how worthy the objective or how deceitful the adversary."

That level was clearly reached and surpassed in the instant case.

E. The District Court Properly Exercised Its Supervisory Powers to Prevent a Repetition of the Government's "Outrageous" and "Bad Faith" Conduct.

The Government next argues that even if the Courts retained any of their Supervisory Powers to suppress evidence after the adoption of Rule 402, they should not be employed to regulate the investigatory arm of the Government so long as no statute, rule or Constitutional provision has been violated. First, as held by the District Court and discussed in the following portion of this Brief, both the Government's investigatory conduct and the use of the fruits of that conduct clearly violated Respondent's Due Process rights under the Fifth Amendment. Second, while rejected by the District Court, and not necessary for this Court to reach in order to affirm the Judgments below, the last portion of this Brief clearly demonstrates that Respondent's Fourth Amendment rights were also violated.

The Government's own Brief supplies some of the most cogent reasons for affirming the Judgments of the Courts below. At page 41 of its Brief, the Government states:

> "What one commentator said in 1965 remains true today: 'Supervisory power has not yet been invoked to exclude evidence obtained through the use of reprehensible police methods *which fall short of illegal conduct.*' Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. J. 1050, 1067 (1965). See also Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656, 1664 (1963) ('Evidence obtained by police action which can be characterized as unfair but *which is not, strictly speaking, illegal* has not yet been excluded under the aegis of the supervisory power')." (Emphasis added).

Respondent accepts the Government's position as quoted above. What directly follows from this proposition, however, is that when Government Agents obtain evidence through "illegal conduct" a District Court may exclude that evidence under its Supervisory Powers.

The Government asserts at page 46, footnote 17 of its Brief that there was no need for the District Court to exercise its Supervisory Powers in the instant case, because the IRS has instituted guidelines requiring that informants be instructed not to violate the law and to report such violations to local authorities. Those guidelines, however, were instituted long after the briefcase caper, and while the Motion to Suppress in this case was pending. Clearly, it was the threat of suppression that motivated the Rule by the IRS.

If this Court were to hold that evidence obtained through knowing criminal conduct was admissible, what assurance is there that the IRS would not either change or ignore its Rules and plan another "briefcase caper". This concern is more than an "imaginary horrible," since the mere violation of an IRS regulation by its agents has been recently held by this Court not to be the basis for suppression of evidence unless a Constitutional right is violated. *United States v. Caceres*, 99 S. Ct. 1465 (1979). The deterrent of suppression is the public's only real source of protection from the repetition of such willful and criminal conduct. Further, the Government's scheme in committing the "briefcase caper" should not be permitted to succeed merely by the Government stating that it does not intend to commit such illegal acts in the future.

Finally, the Government claims that this Court ought to reverse, because even if the District Court retained its Supervisory Powers, neither its decision nor the decision of the Court of Appeals set sufficiently rigid standards for

the exercise of those powers. As recognized by Mr. Justice Powell in *Hampton v. United States, supra* at 494, n.6:

> "The fact that there is sometimes no sharply defined standard against which to make these judgments is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances."

Each case must be judged ". . . in light of all the circumstances." *Id.* That is exactly what the District Court did and why the Court of Appeals found it unnecessary to comment further.

The District Court did not exercise its Supervisory Powers randomly. Rather, it carefully reviewed the facts and found that:

(1) The theft of the briefcase and rolodex were carefully planned and approved by high ranking IRS personnel (Petitioner's Appendix F, pp. 21a-22a, 26a).

(2) The Government agents knew the subject acts were knowingly and purposefully illegal (Petitioner's Appendix F, p. 50a).

(3) The thefts were specifically committed to obtain evidence used at trials like the one below.

(4) The Government counselled its agents ". . . to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . ." (Petitioner's Appendix F, pp. 54a-55a).

(5) Suppression of the fruits of the "briefcase caper" was necessary to prevent repetition of such "outrageous" conduct (Petitioner's Appendix F, p. 56a).

Clearly, the District Court exercised its Supervisory Powers in the traditionally recognized context to protect the integrity of the Court and to prevent the admission of evidence ". . . when the Government's procedure in obtaining evidence is purposefully illegal or the procedure is a known and purposeful act, performed with a bad faith hostility to an individual's constitutional right . . ." (Petitioner's Appendix F, p. 62a).

II. EVEN WITHOUT CONSIDERATION OF THE TRIAL COURT'S SUPERVISORY POWERS, EVIDENCE OBTAINED THROUGH THE WILLFUL COMMISSION OF CRIMES BY GOVERNMENT AGENTS WAS PROPERLY SUPPRESSED BY THE TRIAL COURT IN ORDER TO PROTECT RESPONDENT'S DUE PROCESS RIGHTS.

A. The Government's "Bad Faith Hostility" to the Legal Process in Perpetrating the "Briefcase Caper" Resulted in a Clear Violation of Respondent's Due Process Rights.

Although the Circuit Court did not reach the issue, Respondent deems it appropriate to note that, even if the District Court had not suppressed the tainted evidence on the basis of its Supervisory Powers, it properly suppressed that evidence pursuant to the Due Process Clause of the Fifth Amendment.[7] In arguing that Rule 402 barred the Trial Court from suppressing the subject evidence, the Government seems to ignore that the Trial Court held that the use at trial of the fruits of the outrageous and criminal acts of Government agents violated the Respondent's Due Process rights. By its terms, Rule 402 authorizes a District Court to suppress evidence, the use of which would be contrary to the Constitution of the United States. The

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7. As recognized by Mr. Justice Powell in *Hampton, supra,* the analysis of suppression under the Court's Supervisory Powers follows in the same manner as the analysis under the Due Process Clause.

Advisory Committee in its Note specifically recognized that the Rules left with the Courts the power and responsibility to exclude evidence based upon constitutional considerations:

> "The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)." 56 F.R.D. 218. See also, 10 MOORE'S FEDERAL PRACTICE, §402.03[1], p. iv-59 (1979).

The clear precedent for the exclusion by the Trial Court of all evidence derived from the Government's illegal conduct pursuant to the Due Process Clause of the Fifth Amendment follows directly from *Rochin v. California, supra.*[8] The pivotal issue is whether the Government

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8. The words of Mr. Justice Frankfurter were quoted by the Trial Court as the basis for its decision:

> "Regard for the requirements of Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty'.
>
> . . . .

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agents acted illegally and whether such illegality offended ". . . those canons of decency and fairness which express the notion of justice of English speaking peoples even toward those charged with the most heinous offenses . . .", *Id.* at 169.[9]

While the District Court herein recognized that a mere technical violation of the law or conduct committed in good faith, which subsequently proves to be illegal, is not a basis for exclusion of evidence based upon Due Process grounds, *Brown v. Illinois, supra* (Justice Powell concurring); *Brewer v. Williams,* 430 U.S. 387 (1977) (C. J. Burger, dissenting), *reh. den.,* 431 U.S. 925 (1977), the District Court properly held that where the Government's illegal

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Footnote continued—

> Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." 342 U.S. at 169, 172. (Citations omitted).

9. In *United States v. Russell,* 411 U.S. 423 (1973), a Government undercover agent provided a chemical to a defendant who used it to manufacture illegal drugs. The Supreme Court, in finding that *the Government had done nothing illegal,* and had not infringed upon the Due Process Clause, refused to dismiss the indictment. However, the Court specifically stated:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 431-432.

conduct was done knowingly and purposefully in "bad faith hostility" to any person's fundamental rights then society has a strong interest in excluding such evidence in order to deter repetition of such outrageous conduct. The use of such evidence approaches—if it does not fully reach—the concept of "trial by force" that is the antithesis of Due Process of Law.

B. In Order to Give Meaning to Respondent's Due Process Rights and to Deter Future Outrageous and Purposefully Illegal Conduct by the Government All Evidence Illegally Obtained Was Properly Suppressed.

In *United States v. Janis, supra,* this Court enunciated the balancing test which must be applied in invoking the Exclusionary Rule. The Court stated that evidence should be excluded when there is a showing that there exists, " 'a sufficient likelihood of deterring the [unlawful] conduct of the State [Federal] police so that it [the social benefit of exclusion] outweighed the societal costs imposed by the exclusion'." The District Court quite correctly applying the *Janis* test found that:

> ". . . [S]ociety's interest in deterring Due Process violations outweighs society's interest in allowing the fact finder to view all relevant evidence only when an official's conduct demonstrates a bad faith hostility to the strictures imposed on him by the Constitution." (A. 49, Petitioner's Appendix F, p. 46a).

This District Court concluded that:

> "The activities of the Government agents Jaffe and Casper were outrageous. They plotted, schemed and ultimately acted in contravention of the United States Constitution and laws of Florida, knowing that their conduct was illegal. It is imperative to signal all like-minded individuals that purposeful criminal acts on behalf of the Government will not be tolerated in this country and that such acts shall never be allowed to bear fruit."[10] (A. 51, Petitioner's Appendix F, p. 50a).

The suppression of any evidence derived from the "briefcase caper" is mandated by the need to deter such grossly illegal activity on the part of the Government. As Mr. Justice Brandeis stated in *Olmstead v. United States,* 277 U.S. 438, 485 (1927):

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means —to declare that the government may commit crimes in order to secure the conviction of a private criminal —would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

This Court stated with regard to the Exclusionary Rule's deterrence rationale:

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10. See also, *Elkins v. United States, supra,* 217, 222 (1960); *United States v. Peltier,* 422 U.S. 531, 537-538 (1975); *United States v. Janis, supra,* 466; *Mapp v. Ohio, supra,* 659; *Brown v. Illinois, supra,* 599.

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkkins, supra,* 217.

The Government argues that the clear Fifth Amendment violations cannot be raised unless Respondent's Fourth Amendment rights were also violated. That position has been laid to rest by this Court. In *Dunaway v. New York, supra,* at 4640, this Court stated:

". . . *Brown v. Illinois, supra,* settled that '[t]he exclusionary rule . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth' 422 U.S., at 601 . . ."

* * * * *

"Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached."

Finally, in expressing the same policy which must be applied in the case at bar, Mr. Justice Brennan concluded:

"To admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the "procedural safegards" [Miranda warnings] of the Fifth.'" *Id.*

The District Court here found that it was clear from the testimony that the only practical way to deter the type of conduct engaged in by Jaffe and Casper on behalf of the Government would be to suppress the evidence that was so obtained (A. 54). One of the most disturbing facts in this case is that both before and after the "briefcase caper"

IRS agents openly discussed and believed that persons whose names were obtained from Wolstencroft's briefcase could not attack the illegal search (A. 363-366). Because they were secure in such belief, the Government Agents engaged in illegal activity. Consequently, suppressing the evidence so obtained will be directly responsible for deterring such conduct in the future.

Mindful of such considerations, the District Court correctly applied the rationale of *Michigan v. Tucker,* 417 U.S. 433, 447 (1974), in stating that among the reasons for applying the Exclusionary Rule in this case was ". . . to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."

The callous attitude of those federal officers involved in planning the "briefcase caper", based upon the belief that their intentional and knowing illegal conduct would not in any way affect the admissibility of evidence obtained, is exactly the attitude that Mr. Justice Frankfurter in *Rochin* sought to eliminate. Since, according to the Government's view, the only person who would have any standing to contest the admissibility of evidence derived from the "briefcase caper" was Wolstencroft, and since at the time of the "caper" the Government had no intention of taking any action against Wolstencroft, without the suppression of such evidence, there would be no deterrent whatsoever to repeated criminal actions on the part of IRS and other Government agencies.[11]

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11. The District Court determined from the record as constituted, that the IRS possessed sufficient information regarding the use, by one Allan Palmer, of the Castle Bank to hide illegal income, combined with information from Casper, that Wolstencroft would be entering the United States with Castle Bank depositors' records, to obtain a valid search warrant for those records (A. 40,

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Without the deterrent of the Exclusionary Rule under the Fifth Amendment, Due Process Clause (and under the Court's inherent Supervisory Powers) Government agents would be free randomly and openly to commit gross criminal violations against persons, whom the Government has no intention of prosecuting, in order to obtain evidence against persons who would have no standing to challenge such evidence. In a nation of laws, the Government cannot be permitted to recklessly disregard the rights of individuals. Laws govern all persons, Government agents as well as private citizens. Without the limitations applied by the Exclusionary Rule, as consistently approved by this Court, reprehensible conduct would be repeated over and over again, thereby allowing our Government, whose prime responsibility is the protection of the rights of its citizens, to become the prime violator of those rights.

III. RESPONDENT HAD STANDING UNDER THE FOURTH AMENDMENT TO OBJECT TO THE INTRODUCTION OF ANY EVIDENCE RESULTING FROM THE "BAD FAITH" CRIMINAL CONDUCT OF GOVERNMENT AGENTS.

The District Court had solid authority for its suppression of the subject evidence, based upon its Supervisory Powers and the violation of Respondent's Fifth Amendment Due Process rights. The Government argues, however, that suppression was improper since it claims that Respondent lacked standing under the Fourth Amendment to object to the fruits of the "briefcase caper". Even though

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Footnote continued—
n.55, Petitioner's Appendix F, p. 31). *United States v. Manufacturers National Bank of Detroit*, 536 F.2d 699 (6th Cir., 1976), *cert. den.*, 429 U.S. 1039 (1977). Therefore, *not only was the conduct of the Government agents willful, intentionally illegal and a clearly outrageous violation of the American concept of justice, but it was totally unnecessary.*

there is ample authority for suppression, as hereinbefore discussed, without considering the Fourth Amendment, since the Government has raised the issue of Respondent's Fourth Amendment rights, Respondent will discuss them.

The Fourth Amendment guarantees to the individual the right to be free from unreasonable searches and seizures. This Court has enforced those rights by excluding from consideration at trial against the person whose reasonable expectation of privacy had been invaded, all evidence obtained by an illegal search or seizure. *Mapp v. Ohio, supra; Alderman v. United States, supra.*

This Court has developed a threefold test to be applied in determining whether evidence may be suppressed under the Fourth Amendment. First, the evidence in question must be the product or fruit of an unconstitutional search or seizure, *Weeks v. United States*, 235 U.S. 697 (1914). Second, the unlawful search or seizure must have been conducted by the Government or its agents. *Burdeau v. McDowell*, 256 U.S. 465 (1921). And third, the party objecting to the introduction of such evidence must have standing to object. Specifically, the moving party must be the party whose privacy interests were violated. *Alderman v. United States, supra.*

The satisfaction of the first two criteria in this case is unquestionable. The Government openly, and with callous disregard for the rights of the Defendant and the integrity of the Federal Judicial System, has consistently admitted the intentional and illegal theft of the briefcase. There is not even a claim of good faith. In fact, its agents boasted and gloated over the illegality of the search and seizure of Wolstencroft's briefcase. The District Court found, however, that Defendant Payner had no standing under the Fourth Amendment to raise the illegality of the seizure of Wolstencroft's briefcase. The Trial Court determined that

it was not Payner's Fourth Amendment rights that were violated, but those of Wolstencroft and applying the balancing test of *United States v. Janis, supra,* the interest of society in obtaining such evidence was not outweighed by the deterrent effect upon Government officers.

Respondent asserts that the District Court erred on both aspects of its determination as to lack of standing. It was Respondent's expectation of privacy that was violated and society's interest in deterring such Government misconduct far outweighs the need for such evidence.

It is clear from the record that Wolstencroft was not the intended target of the illegal search and seizure of his briefcase. The purpose of the theft of the briefcase and the materials contained therein was to obtain copies of bank records which were confidential under the banking laws of the Bahamas. The Statute Law of the Bahama Islands (1789-1915), The Banks Act; Chapter 96.9 (1909).[12]

Indisputably Respondent was one of the class of persons against whom the "briefcase caper" was directed. The Trial Court found that Payner, not Wolstencroft, was the object of the Government's outrageous conduct. Payner, not Wolstencroft, was one of the intended victims of the Government's illegalities. While the District Court did not find that the Government knew specifically that it was purloining materials relating to taxpayer Payner, the Government was cognizant that it was stealing documents relating to heretofore unknown taxpayers *such as Payner.*

12. "A bank shall from time to time, if required by the Governor, furnish to the Governor a special return and such further information as the Governor may reasonably see fit to call for:

Provided that the bank shall not, nor shall anything herein contained be construed to authorize a bank to, make known the private account or accounts of any person whatever having dealings with the bank."

Consequently, it was Payner and other yet unknown taxpayers, not Wolstencroft, who were the parties aggrieved by the Government's willful scheme[13] of multiple illegalities.

The District Court looked to cases such as *Brown v. United States,* 411 U.S. 223 (1973); *United States v. Dionisio,* 410 U.S. 1 (1973); *Alderman v. United States, supra; United States v. Hunter, et al.,* 550 F.2d 1066 (6th Cir., 1977), which clearly enunciated the established doctrine that only persons whose "expectation of privacy" was violated by the illegal search can object to the introduction of evidence obtained from that search. The District Court held that since Payner was not the physical subject of the illegal search, i.e. that it was not his briefcase that was stolen and opened by Government agents, he had no standing to object to that search.

Respondent asserts that the "briefcase caper" was unlike the above cited cases where the victim of the illegal search was the person against whom the search was directed, but during the course of search, the Government also obtained evidence against a second party. The Courts have consistently held that the second party, who is not the intended victim of the search, may not challenge the legality of that search. The question presented in the case currently before the Court is quite different. The person whose physical property was violated was not the one against whom a technically improper search was directed. Rather, the Government committed a willful theft of confidential bank records in the possession of a bank employee to use against the depositors named in those records. Such records were legally confidential under the

13. Even if the Government's current Brief before this Court, it still refers to the entire matter as "Casper's scheme" and gloats that it "worked successfully" (Petitioner's Brief, p. 5).

laws of the nation of incorporation of the Castle Bank and Trust Company of the Bahamas.[14] Accordingly, those records were subject to said depositors' reasonable expectation of privacy.

As was stated in *Katz v. United States,* 389 U.S. 347, 351 (1967), ". . . the Fourth Amendment protects people, not places. . .", 389 U.S. at 351, and ". . . what he [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Defendant Payner clearly had a reasonable expectation that the United States Government would not violate the laws of the Bahamas by stealing his confidential bank records. See also, *Camara v. Municipal Court of San Francisco,* 387 U.S. 523 (1967).

The Government asserts that *Rakas v. Illinois, supra,* bars Respondent from raising not only the Fourth Amendment violations, but also the Fifth Amendment Due Process issues. As previously demonstrated, the standards and considerations under the Fifth and Fourth Amendments are totally separate from each other.[15] Further, the facts of the instant case could not be more different. *Rakas* involved a "good faith" stop and search of an automobile by the police. The instant case involves the "bad faith" commission of criminal acts by Government agents. In *Rakas,* the owner of the vehicle was one of the targets of the search and had standing to object. In the case at bar, the Government agents sought specifically to secure evidence against persons such as Respondent, not against the physical victim, Wolstencroft.

In any event, Mr. Justice Rehnquist in *Rakas* held that merely being a "target" of an illegal search did not

14. See Note 12.
15. *Supra,* p. 32.

violate a defendant's Fourth Amendment rights, as had been implied in *Jones v. United States,* 362 U.S. 257 (1960), but rather, Fourth Amendment rights arise only where the illegal search violated a *legitimate* expectation of privacy. Specifically, Mr. Justice Rehnquist held that a passenger in an automobile did not possess a legitimate expectation of privacy with respect to anything transported in that automobile. However, Mr. Justice Rehnquist recognized the right of a non-owner to assert a Fourth Amendment violation if he had such a "legitimate expectation of privacy", and stated:

> "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, *Commentaries,* Book II, Ch. I, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Rakas v. Illinois, supra* at 143, n.12.

See, Note, *The Supreme Court, 1978 Term,* 93 HARV. L. REV. 1, at pp. 171-180 (1979).

Mr. Justice Powell in his concurring opinion stated that in determining a legitimate expectation of privacy, ". . . no single factor invariably will be determinative." *Rakas v. Illinois, supra* at 152. Clearly, no expectation of privacy could be more legitimate than the expectation

of the privacy of bank records mandated by statute of the nation where the subject bank was chartered and is domiciled.

The District Court cited *California Bankers Assoc. v. Shultz,* 416 U.S. 21 (1974) in support of its refusal to permit Payner to claim Fourth Amendment protection. In that case the California Bankers Association sought to restrain enforcement of the Bank Secrecy Act of 1970 which required banks to keep certain records of depositors' transactions and to furnish such to the Secretary of the Treasury as requested. The claim was that the record keeping practices violated Fourth Amendment rights of depositors. This Court upheld the Treasury regulations requiring the keeping of such records. That decision, however, in no way affects the outcome of this case. As soon as those regulations were issued, no depositor in any United States bank could have a reasonable expectation of privacy of his bank records.

With respect to the records of a depositor in the Castle Bank and Trust Company of the Bahamas on the other hand, the laws of the Bahamas provided full secrecy and confidentiality and there was nothing illegal or improper for an American citizen to maintain such an account. Therefore, a depositor had a reasonable and legitimate expectation of complete privacy. The Government's criminal acts in obtaining such records violated Respondent's legitimate expectation of privacy under both *Katz* and *Rakas* and, accordingly, made the fruits of that criminal conduct inadmissible at trial against Respondent.

CONCLUSION

Based upon its inherent Supervisory Powers, and the Due Process Clause of the Fifth Amendment to the United States Constitution, as well as the Fourth Amendment to the United States Constitution, the District Court had adequate authority to refuse to permit the introduction of evidence obtained in bad faith by willful and knowing criminal acts of Government agents. Respondent accordingly respectfully requests that this Court affirm the Judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

CONSTITUTION AND STATUTES INVOLVED

United States Constitution - Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution - Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Florida Statutes Annotated §777.011

Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether

he is or is not actually or constructively present at the commission of such offense.

Florida Statutes Annotated §812.011

(1) "Property" means anything of value, including, but not limited to, real estate, tangible and intangible personal property, contract rights, evidences of debt, choses in action and other interests in or claims to wealth, admission or transportation tickets, animals, food and drink, transient accommodations at any public lodging establishment, and gas, water, and electric and other power and telephone service.

Florida Statutes Annotated §812.021(1)(a)

(1) A person who with intent unlawfully to deprive or defraud the true owner of his property or of the use and benefit thereof, or to appropriate the same to the use of the taker or of any other person:

(a) Takes from the possession of the true owner, or of any other person; or obtains from such person possession by color or aid of fraudulent or false representations or pretense, or of any false token or writing; or obtains the signature of any person to a written instrument, the false making whereof would be punishable as forgery; or secretes, withholds, or appropriates to his own use, or that of any other than the true owner, any property;

* * * * *

Florida Statutes Annotated §812.021(5)

It shall be sufficient for any indictment, information, or warrant returned, filed, or issued under this section to charge generally that the defendant, at the time and in the county specified, did steal the personal or real property,

thing in action, evidence of debt or contract, or article of value out of which the prosecution arose, describing the same in general terms and alleging generally the ownership and value thereof. It shall not be necessary when alleging the larceny of property over a period of time that the exact date or dates the property was taken be alleged, but instead the total period of time may be alleged generally. This section shall not be construed as intending to interfere with the power of the court to require the state to furnish the defendant with a bill of particulars in proper cases and on sufficient showing that cause exists for the same.

Florida Statutes Annotated §812.081

(1) As used in this section and §812.091:

(a) "Article" means any object, device, machine, material, substance, or composition of matter, or any mixture or copy thereof, whether in whole or in part, including any complete or partial writing, record, recording, drawing, sample, specimen, prototype, model, photograph, microorganism, blueprint, map or copy thereof.

(b) "Representing" means completely or partially describing, depicting, embodying, containing, constituting, reflecting, or recording.

(c) "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improve-

ment thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;

2. Of value;

3. For use or in use by the business; and

4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(d) "Copy" means any facsimile, replica, photograph, or other reproduction in whole or in part of an article and any note, drawing, or sketch made of or from an article or part or portion thereof.

(2) Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

(3) In a prosecution for a violation of the provisions of this section, it is no defense that the person so charged returned or intended to return the article so stolen, embezzled, or copied.

Statute Law of the Bahama Islands (1789-1915), The Banks Act; Chapter 96.9 (1909)

A bank shall from time to time, if required by the Governor, furnish to the Governor a special return and such further information as the Governor may reasonably see fit to call for:

Provided that the bank shall not, nor shall anything herein contained be construed to authorize a bank to, make known the private account or accounts of any person whatever having dealings with the bank.

Federal Rules of Evidence, Rule 402

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.